No. 363.
Br. of Griggs & Worthington
Appt.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Mar. 7, 1902.

No. 363.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, APPELLANT,

vs.

J. FORREST MANNING AND HARRY E. RUPPRECHT, TRADING AS J. FORREST MANNING AND COMPANY, APPELLEES.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

On the 22d day of April, 1878, a contract was entered into between Gardiner G. Hubbard, trustee, holding the title to the telephone inventions of Alexander Graham Bell, and George C. Maynard, whereby the latter became the sole agent for and controlled in the District of Columbia those inventions and any subsequent improvements thereon (19). This contract relates to the general use of telephones, and has no reference to a telephone exchange, as at that time there was not such a thing in existence.

On the 2d day of December, 1878, a further agreement

was made between the same parties (Hubbard having in the meantime become trustee for the Bell Telephone Company), whereby Maynard agreed to introduce a telephone exchange system into Washington and suburbs. This agreement made Maynard sole licensee for the lifetime of the patents, and of all reissues thereof or improvements thereon (21).

On the 28th day of October, 1879 (Hubbard having in the meantime assigned the patents in question, through the Bell Telephone Company, to the National Bell Telephone Company), a third agreement was entered into between the latter company and Maynard, by which Maynard obtained full and exclusive license to use not only the Bell telephone inventions and improvements thereon, but also other telephone inventions and appliances theretofore owned or controlled by the Western Union Telegraph Company (23). By this agreement Maynard obtained the exclusive right to use the patents of Edison, Gray, and others in addition to those of Alexander Graham Bell.

On the 9th day of June, 1881, Maynard transferred to Henry D. Cook, Jr., all his rights under these contracts, except those relating to telephone exchange business, which the assignment recites had already been transferred to a corporation called the National Capital Telephone Company, by an instrument dated December 1, 1879 (24).

On the 31st day of March, 1883, a contract was made directly between the American Bell Telephone Company and the National Capital Telephone Company which related only to telephones used in exchanges in the District of Columbia, and which confirmed and made perpetual the exclusive rights of the National Capital Telephone Company in that regard. This contract required the payment of certain royalties by the licensee to the licensor, and provided that ninety days' default in the payment thereof might, at the option of the licensor, result in the termination of all the rights of the licensee under the contract (26). On the same day a similar agreement was entered into between the same

parties, which applied to telephones used in the District of Columbia for other than exchange purposes (29).

The appellant in this case, The Chesapeake and Potomac Telephone Company, is a corporation organized under the laws of the State of New York. A copy of its charter was put in evidence in the court below as "Defendant's Exhibit No. 1" (19), but by stipulation of counsel it was omitted from the transcript filed in the Court of Appeals (132). On the 30th day of July, 1883, the National Capital Telephone Company transferred all its right, title, property, and franchises to the Chesapeake and Potomac Telephone Company, in consideration of seventy-five hundred shares of stock of the latter company (32). The total capital stock of the appellant company was and is $2,650,000, divided into 26,500 shares of $100 each. It succeeded not only to the rights of the National Capital Telephone Company in the District of Columbia, but to the rights of another corporation, called the Telephone Exchange Company, which had operated and controlled telephones and telephone exchanges in the State of Maryland and a small part of West Virginia, under contracts with the National Bell Telephone Company.

On the 1st day of August, 1883, a contract was entered into between the American Bell Telephone Company, the Chesapeake and Potomac Telephone Company, the National Capital Telephone Company, and the Telephone Exchange Company, whereby the rights of the Chesapeake and Potomac Telephone Company, under the assignment made to it two days before by the National Capital Telephone Company, were recognized, and the Chesapeake and Potomac Telephone Company contracted directly with the American Bell Telephone Company to be bound by the terms of the previous agreements as though they had been made with it (33).

The first regular telephone exchange operated in the District of Columbia was started by George C. Maynard in January, 1879 (402), and the only such exchange in the District

has been the one which was so started and which was afterwards carried on by Maynard and his assignees, including the appellant.

A telephone exchange has one or more central offices, equipped with an apparatus called a switch-board, which is so constructed and operated that each subscriber can be put into direct communication with every other subscriber. In addition to the ordinary subscribers' stations, there are connected with the exchange private branch exchanges, each of which has its own switch-board, and pay stations.

The operator at a private branch exchange can connect any two of the telephones in the branch exchange without reference to the main exchange; but when it is desired to connect any one of the telephones in the private branch exchange with a telephone in the main system, the connection is established by means of a trunk line between the private branch exchange switch-board and the main switch-board.

Private lines have no connection, direct or indirect, with the main exchange. A private line may connect but two telephones, as when the owner connects a telephone in his house with one in his stable or office, or it may have connected with it several telephones. It may also consist of a small private exchange, having its own switch-board, with which are connected two or more stations, but having no means of communication with the main exchange. It must have at least two telephones, but there is no limit to the number which it may have.

A pay station, as its name indicates, is one where the telephone may be used by any one upon paying the required price for his message.

The early telephone exchanges were experimental and, necessarily, were very primitive affairs. The telephone itself as first used could not be compared with the improved instruments which afterward came into general use. A single iron wire was used to reach a number of subscribers, and the elec-

tric circuit was completed through the earth, forming what is known as the grounded circuit. The wires were strung largely from housetop to housetop, with an occasional cheap pole to keep the wires off the streets. Next a complete metallic circuit was established, so that each subscriber had a wire leading from the exchange to his station and thence back to the central office. Then, when the best service was required, iron and steel wires were dispensed with and copper wires substituted.

Gradually, in the built-up portions of many large cities the wires, instead of being carried overhead, were placed under ground. Separate wires in these conduits were done away with, and cables carrying from fifty to three hundred wires have been substituted. Where overhead systems are in use it is becoming common to carry the cables on the poles to the point where it is necessary to open them and distribute the separate wires, or pairs of wires, overhead to the subscribers' stations. Long-distance telephoning came finally into vogue. At first messages could be carried in this way but a comparatively short distance, but the improvement in instruments and apparatus and the introduction of complete copper-wire metallic circuits made communication between cities thousands of miles apart feasible, and today the exchanges in the large cities all over the United States are gradually becoming connected, so that communication by telephone between the different cities has become almost as much a matter of course as such communication between stations in the same city had become as far back as 1885.

It is generally conceded that the instrument which is commonly known as the Bell solid-back telephone, with metallic circuit of copper wire, furnishes the best, if not the only, means of long-distance communication between places hundreds and thousands of miles apart.

As the service has changed and improved, so has the system of charging for the service changed from time to time.

At first every subscriber to the telephone exchange paid the same rate, and everybody had the same party-line service. Soon those who used their telephones a great deal and did not want to be annoyed by having other telephones on the same wire obtained a separate wire, and would pay more for it than was paid by the subscriber who had from one to a dozen other telephones on the same wire. As the complete metallic circuit, first of iron or steel and then of copper wire, increased at once the efficiency and cost of the service, those who preferred metallic circuits to the old grounded circuit, with all its noise, cross-talk, and other drawbacks, took it at a higher price. The early instruments could not be used satisfactorily for long-distance service, and the subscribers who had frequent occasion for telephone communication with other cities welcomed and were willing to pay an increased price for the solid-back telephone when it was introduced.

But the greatest change in the matter of compensation for the use of telephones in exchanges grew out of an unexpected and probably unparalleled result. As the number of subscribers in the different exchanges increased, it was found that the use of the telephone by each subscriber also increased. It will be seen hereafter that it is contended in this case that there is a limit to this development, but it is everywhere admitted that up to a certain point the cost as well as the usefulness of each telephone station in an exchange increases as the number of subscribers increases. Again, there is a vast difference in the number of times that a telephone is used by the different subscribers. This difference is so great that some users in the course of a year will make a hundred times more calls than others. From these causes came what is known as the message-rate service. Under this system the annual rate paid by a subscriber is regulated by the number of times he uses his telephone. No charge is made for incoming calls, and a subscriber may buy any number of calls from six hundred up, to be used any time during

the year. If he needs more calls than he has contracted for, he may have additional service at a cost of a few cents per message.

The act of Congress, the validity of which is involved in this suit, is a proviso which was tacked on to the District appropriation bill in the House of Representatives on the 1st day of February, 1898, and which became a law on the 30th day of June, 1898. That proviso is in the following words:

"*Provided*, That from and after the passage of this Act it shall be unlawful for any person or any telephone company doing business in the District of Columbia, to charge or receive more than fifty dollars per annum for the use of a telephone on a separate wire; forty dollars for each telephone, there being not more than two on a wire; thirty dollars for each telephone, there being not more than three on a wire, and twenty-five dollars for each telephone, there being four or more on the same wire" (30 Stat., 538).

Upon a comparison of this statute with the number of the appellees, subscribers in this District on separate wires, on two-party lines, &c., on December 31, 1897, June 30, 1898, and October 31, 1898 (88, 136, and 137), it will be seen that the average rate under the statute, applied to conditions existing at the date the act took effect, would be about $45 a year.

The history of this amendment is set forth in the stipulation of counsel, which will be found on page 104 of the record. It was not reported from any committee. The District appropriation bill, to which it was appended, passed the House on the following day, February 2, 1898. In the Senate, on March 2, 1898, the bill was reported back by the Committee on Appropriations with certain amendments, one of them being to strike out the proviso in question. But the Senate, on the 8th day of March, decided to retain the proviso in the bill. On the 9th day of March the bill went to a committee of conference, and, as on that day both

Houses had concurred in the adoption of this amendment in the same language, it was not subject to change, but had passed beyond the control of either house.

In both Houses an investigation was undertaken to determine what would be proper rates for telephone exchange service in this District. In the House this was done through a committee, under a resolution adopted on the 14th day of February, 1898. On the 8th day of July, 1898, that committee reported to the House that it had been unable to complete its work, and asked that it be continued with full powers and with leave to sit in vacation and report at the next session of Congress; but on the same day the House adjourned *sine die* without action on this recommendation.

In the Senate, on the 28th day of February, 1898, the Committee on the District of Columbia was authorized to make a similar investigation and directed to report as early as practicable. On the 2d day of March, 1898, that committee was authorized to sit during the sessions of the Senate and to employ an expert accountant and stenographers. The Senate committee entered at once upon the investigation, and employed as an accountant, under the resolution last mentioned, Charles W. Haskins, who immediately, under the direction of the committee, began an investigation of the appellant's books; but, as a few days afterwards—March 8, 1898—the Senate had voted to reinstate this amendment in the appropriation bill, upon motion of the chairman of the committee, it was discharged from the investigation which it had commenced, because the Senate had already disposed of the matter.

It is, therefore, an admitted fact in this case that the amendment in question was adopted without the slightest investigation in either House of Congress as to the cost of the telephone exchange service in this District.

Besides the suit now here on appeal, a number of similar suits was brought by other complainants, all of which have been consolidated with this case (108, 109).

In each case a preliminary injunction was granted restraining the defendant pending the suit from removing the telephones and appliances of the respective complainants and from neglecting or refusing to render telephone exchange service to them in the same manner as the service had theretofore been furnished (15, 16).

The contract between the complainants in this case and the defendant provided that it shall be deemed as continuing until terminated by ten days' notice given by one party to the contract to the other (12, 13). Before bringing their suit the complainants in this case gave notice accordingly and did not bring the suit until the expiration of the ten days (3, 7, 14). The cases which have been consolidated with this, so far as we know, present the same questions of law that arise in this case, except that in a number of the other suits the complainants did not give the ten days' notice or any notice, but brought their suits while their contracts were in full force upon the theory apparently that the statute itself terminated the contracts (433, 434). The complainants took no testimony in support of their bill, assuming that the admissions contained in the answer made a *prima facie* case and threw upon the defendant the burden of showing that the rates fixed by the statute are not sufficient to enable it to carry on the service. The defendant then introduced a mass of evidence tending to show that the actual and necessary expense of carrying on a telephone exchange business in the District of Columbia is much greater than even the maximum rate fixed by the statute.

In rebuttal, aside from the opinions of certain alleged experts as to what would be the cost of establishing, and the expense of operating, such an exchange in the city of Washington, the complainants confined their evidence to testimony relating to the plants and the operation of telephone exchanges in other cities, and particularly in Detroit and Grand Rapids, Michigan, Fort Wayne, Indiana, and Richmond and Norfolk, Virginia. All this evidence was taken

subject to the objection of the defendant (450). The evidence of the defendant in surrebuttal was confined to a reply to that introduced by the complainants in regard to expenses and rates in the cities named. The case came on for final hearing in the court below before Mr. Justice Barnard. Some weeks were consumed in reading the evidence and arguing the case before him. After considering the case for several weeks longer he delivered an opinion, which will be found in the record (110), in which he said:

"I am convinced beyond any reasonable doubt, after disallowing all expenses in the past experience about which there is any room for fair difference of opinion, that the defendant cannot continue to render the same efficient service to subscribers located throughout this District that it has heretofore, without incurring greater expense per subscriber than the maximum rates fixed by this act" (128).

From this decree the complainants appealed to the Court of Appeals, which court reversed the decree of the supreme court of the District and remanded the case to that court "for the entry of a decree granting the injunction in conformity with the opinion of this court" (1182). The opinion of the Court of Appeals was delivered by Mr. Justice Shepard, and will be found on pages 1170 to 1181 of the record. At the foot of the opinion it is stated that "Mr. Chief Justice Alvey concurs in the judgment." The Court of Appeals decided the case upon the ground that it is immaterial whether the rates fixed by the act of Congress in question are remunerative or not; that because the appellant is not a domestic corporation of the District, but a corporation chartered by the State of New York, it is doing business in the District by sufferance merely, and must carry on its business at the rates prescribed by Congress, however ruinously low those rates may be, or withdraw from the District.

While the opinion of Mr. Justice Shepard expressly states that the decree is rendered on the above ground alone, he considers in a cursory way some of the questions of fact in-

volved in the determination of the question whether the rates prescribed are reasonable or not, and concludes with the intimation that if the court had been called upon to decide this question of fact it would have felt obliged "to remand the cause for the introduction of additional evidence upon some of the points of difficulty that have been suggested, and with direction for reference to the auditor to find and report all of the necessary facts with all necessary or important computations and estimates" (1181).

From the decree of the Court of Appeals the Chesapeake and Potomac Telephone Company appealed to this court (1182).

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding that because the appellant is not a domestic corporation of the District of Columbia, it must accept the rates prescribed by the act of Congress of June 30, 1898, whether those rates are remunerative or not, or withdraw from the District.

2. In not holding that said act of Congress is unconstitutional and void because it undertakes to prescribe rates not only for telephone exchange service, but for telephones used on private lines, in which the public have no interest.

3. In not holding that said act of Congress is unconstitutional and void because it undertakes to change unfavorably to the appellant contracts existing and in process of performance when the act was passed, between the United States and the appellant and between the appellant and private persons, thereby impairing the obligation of all such contracts and depriving the appellant of its property in them without due process of law.

4. In not holding that said act of Congress is unconstitutional and void because it undertakes to prescribe single maximum rates for many different kinds of service and equipment varying greatly in efficiency and expense, making no provision for any additional rate for extraordinary service or unusual equipment.

5. In holding that the appellees were entitled to an injunction as prayed, notwithstanding the fact that the service and equipment furnished under their contract with the appellant is a better service and a more costly equipment than is contemplated by the rates prescribed by said act of Congress, thereby compelling the appellant to render service and furnish equipment at a price per annum far below the actual and reasonable cost thereof.

6. In not holding that said act of Congress is unconstitutional and void because the rates prescribed by it, applied to the telephone exchange service in the District of Columbia, are so low that the appellant cannot operate the exchange under such rates at a fair profit or at any profit, but must operate at a great loss, thereby taking its property for public use without any compensation and depriving it of its property without due process of law.

7. In not affirming the decree of the supreme court of the District of Columbia dismissing the bill of complaint.

ARGUMENT.

I.

QUESTIONS OF LAW.

1. *As to the proposition upon which the Court of Appeals decided the case, that because the appellant is a New York corporation, doing business in the District of Columbia "without invitation or express permission," it must accept the rates prescribed by the act of June 30, 1898, assuming them to be "ruinously low and wholly insufficient to meet the necessary and legitimate expenses of the service to be performed," or "withdraw from the District."*

In the opinion the Court of Appeals at some length refers to the legislation of Congress relating to the appellant for the purpose, apparently, of showing that the company crept into the District and established its plant without any authority, direct or indirect, from Congress, except certain privileges as to particular parts of its plant, which privileges were made expressly revocable at the pleasure of Congress. This, if true, would perhaps have no effect upon the legal questions involved, but it should be noted that it is admitted by the pleadings in the case that the fact is otherwise. In the third paragraph of the bill it is averred that—

"For the prosecution of its said business, said defendant has *with the assent and under the direction of the Congress of the United States and of the Commissioners of the District of Columbia*, laid and yet maintains in the public streets, avenues and alleys of the city of Washington, many miles of conduit," etc. (R., p. 2).

The answer admits the allegations of paragraph 3 of the bill with certain exceptions, not including the averment above quoted (6).

Of course, so far as concerns any direct action by Congress relating to this matter, it will be found in the published acts of Congress, and it may well be said that the court will look to them and not to the admissions of the parties. But from the organization of the present District government under the act of June 11, 1878 (20 Stat., 103), until the restrictive legislation referred to in the opinion of the Court of Appeals, the Commissioners of the District exercised without question their powers as representatives of the municipal corporation called the District of Columbia to issue permits to telephone, telegraph, and electric light companies to construct and operate plants for their respective purposes in the city of Washington. If the appellees, instead of relying as a part of their case in the bill upon the fact that the appellant was carrying on the business of a telephone exchange in the city of Washington under the authority and by the direction of Congress and the Commissioners, had questioned its right to be carrying on such a business in the District, a full history of the action of the Commissioners in this regard would necessarily have been placed before the court. It would be manifestly unjust and against the rules obtaining in judicial proceedings in every civilized country to permit a party to obtain relief upon the ground that an averment which he had made in his bill of complaint, and which the defendant had admitted to be true, and as to which there was no evidence in the case, except evidence in support of the averment, was false in fact.

Let it be assumed, however, that the appellant, a New York corporation, established its exchange in this District, without express authority or direction from either the National Government or the municipal authorities of the District. It has not been suggested anywhere that in doing so it violated any act of Congress or any municipal regulation. It is, therefore, transacting its business in this District just

as other corporations organized under the laws of the different States have been doing for a hundred years.

This court has so often held that a State legislature cannot lawfully prescribe for a public-service corporation rates which will require it to do business at a loss, that further consideration of that proposition is out of the question. It is pertinent, however, to inquire into the ground of those decisions in order to determine to what extent, if at all, they apply to the present case.

In *Railroad Commission Cases*, 116 U. S., 307–331, it was said by this court, referring to the power of a State to regulate the charters of railroad corporations, that "it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward; *neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.*"

The above language is quoted and approved in the case of *Reagan vs. Farmers' Loan and Trust Company*, 154 U. S., 362–398, and it is added (page 399) that "it has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. *In every constitution is the guarantee against the taking of private property for public purposes without just compensation.*"

In *Covington, etc., Turnpike Co. vs. Sandford*, 164 U. S., 578–592, this language is used in the opinion of the court:

"Is such legislation forbidden by the clause of the Constitution of the United States declaring *that no State shall deprive any person of property without due process of law?* We are of opinion that, taking, as we must do, the allegations of

the answer to be true, this question must be answered in the affirmative.

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. * * * And, as declared in *St. Louis & San Francisco Railway vs. Gill*, 156 U. S., 649, 657, upon the authority of previous decisions, 'there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, *as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws.*'"

Finally, in *Smyth vs. Ames*, 169 U. S., 466, Mr. Justice Harlan, delivering the opinion, after reviewing the cases on the subject in this court, says (p. 526):

"In view of the adjudications these principles must be regarded as settled:

* * * * * * *

"2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, *would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the Constitution of the United States.*"

The provision of the fourteenth amendment prohibiting the States from depriving any person of property without due process of law applies only to the States, but the corresponding provisions of the fifth amendment apply to the United States.

It follows, therefore, necessarily, that the Court of Appeals of the District of Columbia has decided this case upon the ground that a corporation organized under the laws of one of the States of this Union, lawfully engaged in the performance of its business in the District of Columbia, but without express authority from Congress or the District authorities, is not entitled to any protection or benefit from the clauses of the fifth amendment of the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation.

Logically and necessarily it must follow that a corporation of one of the States so placed is not entitled in the District of Columbia to the protection of any other of the provisions of the Constitution of the United States and its amendments. As to any or all of those provisions it must submit to the will of Congress "or withdraw from the District." The importance of this ruling is manifest. Its novelty will not be disputed.

Since there is no direct precedent for the case, this being the first time such a question has arisen in the District of Columbia, we must look, in the first instance, to the decisions of this court in analogous cases, and ascertain whether the principle underlying them controls the case at bar. In our judgment, when this has been done it will be unnecessary to go further.

The Dartmouth College case established the principle that the granting of a charter by a State to a corporation, and the acceptance thereof by the incorporators, constitute a contract between the State and the corporation which the State, by virtue of article I, section 10, of the Constitution, is prohibited from impairing. Since that time it has come to be the general rule, in granting charters to private corporations or in authorizing their organization under general law, to reserve to the State the right to amend or repeal

their charters. There would seem to be no essential difference between the constitutional rights of a domestic corporation of a State whose charter the State may repeal or amend at any moment and that of a corporation of any other State which may be required at any time to cease doing business in the State, and it is well settled that every State in the Union has the right to altogether exclude from transacting business within its limits corporations organized under the laws of the other States, and in general to prescribe such conditions as it sees fit to their coming into the State by their agents for the purpose of carrying on business there.

But it is also settled law that while a State under the reserved right of amendment and repeal, or under the right of exclusion of foreign corporations from the State, may in general affix such conditions as it pleases to the continuance in existence of the domestic corporation, and to the carrying on of business in the State by a foreign corporation, yet in neither case can this right be exercised by making the condition the giving up of any right or privilege under the Constitution of the United States.

A. The cases on this subject growing out of the reserved right to amend or repeal the charters of domestic corporations.

An act of the legislature of Michigan required all railroad companies doing business in the State to sell 1,000-mile tickets at reduced rates. A Michigan corporation whose charter the State had reserved the right to amend, alter, or repeal refused to sell such tickets at the rate thus fixed. The proceeding was by mandamus to compel the company to sell to the petitioner a 1,000-mile ticket. The price fixed was less than the maximum rate fixed by another general statute regulating maximum rates for the transportation of passengers on railroads in the State. Held,

1. The law was an unlawful discrimination in favor of a certain class—those able to buy in quantities.

2. The right to alter or repeal did not give the right "to take away or destroy the property, or annul the contracts of a railroad with third persons."

3. That the right to repeal the charter, and so to terminate the existence of the company, was no answer. "To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts."

Lake Shore Co. vs. Smith, 173 U. S., 684.

In *Shields vs. Ohio*, 95 U. S., 319–324, the question involved was whether, under the reserved power to alter, revoke, or repeal, the General Assembly of Ohio could legally pass a law prescribing rates for the transportation of passengers by a railroad. It was not claimed by the company that the rates prescribed were unreasonable, and it was held that the General Assembly had the right to adopt the statute. But Mr. Justice Swayne in delivering the opinion said:

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

In *Sinking Fund Cases*, 99 U. S., 700–720–721, when this court had under consideration the effect of the reservation by Congress of the right to amend, alter, or repeal the charter of the Union Pacific Railroad Company, Mr. Chief Justice

Waite, delivering the opinion, quotes with approval the foregoing extract from the opinion in *Shields vs. Ohio*, and says further:

"Congress not only retains, but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

In *Close vs. Glenwood Cemetery*, 107 U. S., 466–475, a case which originated in the supreme court of the District of Columbia, it appeared that Congress in an act incorporating the cemetery company reserved the right to alter, amend, modify, or repeal the act. One of the questions in the case was whether this reserved power had been legally exercised by an amendatory act authorizing the sale of lots in the cemetery and directing how the proceeds of such sales should be distributed. Mr. Justice Gray, in delivering the opinion of the court, said:

"After the cemetery had been laid out, improved and used for the burial of the dead for more than twenty years, and two thousand burial lots had been sold, it was a reasonable exercise of the reserved power of Congress to authorize the owners in good faith of lots upon which burials had been made, to elect a majority of the trustees, in whom should be vested the control and management of the cemetery, with a due regard to the equitable rights of all persons having any vested interests therein; and to provide that a portion only of the receipts arising from the future sale of lots should be paid to the original proprietors, and the rest be devoted to the improvement and maintenance of the cemetery. Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established; and there is nothing in the record before us to show that the proportion of one-fourth of the gross receipts from future sales of lots, which is fixed by the act of Congress of

1877 and by the decree of the court below, as a compensation for the title and interest of the original proprietors and associates, is not a reasonable one."

In the case of *Tiburcia Parrott*, 1 Fed. Rep., 481, the legislature of California had enacted that no corporation organized under the laws of that State should employ in any capacity any Chinese or Mongolian. The validity of this act being in question, the State relied upon the right which it concededly had to alter or repeal the charters of its corporations. The case was heard before Sawyer, circuit judge, and Hoffman, district judge, who delivered concurring opinions holding the act in question invalid because it was in conflict with the treaty between the United States and China. Judge Hoffman held further that, without reference to the treaty, the act was invalid because it was in violation of the fourteenth amendment prohibiting any State from depriving any person of life, liberty, or property without due process of law. On pages 485 to 493 he considers the claim that the State had power to pass such a law under its reserved right to repeal, alter, or amend the charters of its corporations. His conclusion is indicated in the following extract from his opinion:

"Can it be pretended that this law, of the effect of which I have given these examples, is reasonable as between the State and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, 'under the guise of amendment or alteration,' to attain quite a different, and, as I shall presently show, an unconstitutional object, viz: to drive the Chinese from the State, by preventing them from laboring for their livelihood? I apprehend that, to these questions, but one candid answer can be given. I am therefore of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void,

as not being a 'reasonable,' *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this State have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the State may enact with respect to them, in common with private individuals.

"In the foregoing observations I have treated the question discussed as if the reservation had been found in a special charter, by which the corporation was created, and its franchises conferred."

The constitution of the State of California, which reserved to the State the right to amend, alter, or repeal the laws under which private corporations should be formed, provided that mortgages should be deducted from property in estimating its value for taxation "except as to railroad and other *quasi* public corporations." In a case in the United States circuit court for the California district, this exception was held to be void under the provisions of section one of the fourteenth amendment. Concurring opinions were delivered by Mr. Justice Field and Circuit Judge Sawyer. Mr. Justice Field said:

"In the second place, the State, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the Federal Constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of its property; that they shall make no complaint if their goods are plundered

and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer, by its general laws, upon corporations certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

Judge Sawyer on the same subject said:

"A corporation having been formed with capacity to acquire and hold property, the legislature may, doubtless, grant to it, as well as to natural persons capable of taking, property rights; but such rights of property, when once vested, can no more be withdrawn than the property acquired from other sources, or than property granted to, or acquired by, natural persons. The property acquired in the exercise of its corporate faculties from whatever source derived, is the property of the metaphysical being called the corporation, held, however, in trust for the sole benefit of the corporators. As such, it is protected like all other property, and can only be taken by the law of the land, in some one of the modes not inhibited by the Constitution. It cannot, in my judgment, be taken even as a further condition of corporate existence without the assent of the corporation or its corporators. There is no consent in this case to submit to any such conditions, and that is not the basis upon which the action is brought. There is no promise to pay a bonus set out in the complaint upon which an action can be main-

tained. I apprehend that a mere provision in the form of a statute, or a State constitution adopted after the formation of a corporation, that corporations under the laws should cease to exist unless they surrender to the State all the property theretofore acquired by the corporation, would be void. And power to demand a part as a condition of existence, however small, is power to demand all. Such a statutory demand would be but a flimsy guise or pretext for evading all the guaranties of the Constitution, which would not for a moment be tolerated. It would be to seek indirectly what could not be attained directly; the accomplishment of an unlawful end, by what, at best, is but apparently lawful means."

County of San Mateo vs. Southern Pacific R. Co. ("Railroad Tax Cases"), 13th Fed. Rep., 722–754–'77.

In the subsequent case, in the same court, of *County of Santa Clara vs. Southern Pacific Railroad Company*, 18 Fed. Rep., 385–407, which involved a similar question, Mr. Justice Field said:

"The State may, of course, accompany its grant with such conditions as it may deem proper for the management of the affairs of the corporation which do not impinge upon any provision of the Federal Constitution; and by the reservation clause it will retain control over the grant, and may withdraw it or modify it at pleasure. It is on this ground that the State has asserted a right to regulate the charges—the fares and freights—of corporations. But it is a novel doctrine that it can on that ground also control their property, appropriate it, burden it, and despoil them of it, as it may choose, unrestrained by any constitutional inhibitions. That doctrine has no standing as yet in the law of this country. The property acquired by corporations is held independently of any reserved power in their charters. By force of the reservation the State may alter, amend, or revoke what it grants; nothing more. It does not grant the tangible and visible property of the companies, their roads, their roadways, road-beds, rails, or rolling stock. These are their creation or acquisition. Over them it can exercise only such power as may be exercised through its control of the franchises of the companies, and

such as may be exercised over the property of natural persons engaged in similar business.

"As justly said by the supreme court of Michigan, speaking by Mr. Justice Cooley:

"'It cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired—whether by labor in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the law of the land.' *Detroit vs. Detroit & Howell Plankroad Co.*, 43 Mich., 146–'7."

In *Hill vs. Glascow R. Co.*, 41 Fed. Rep., 610, a case which was heard in the United States circuit court for Kentucky, the question was as to the validity of an act of the legislature of that State which provided that the proceeds of the sale of the property of the railroad company, after the discharge of its debts, should be applied toward the payment of certain municipal bonds which had been issued in exchange for stock received by the municipality. In the opinion, which was delivered by Circuit Judge Jackson, it was held that the act was void, notwithstanding that prior to the general incorporation law under which the company was organized it had been provided by law that all State charters should be "subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair their rights previously vested." After quoting the above-cited paragraph from the opinion of Mr. Justice Swayne in *Shields vs. Ohio*, 95 U. S., 319–324, and referring to the opinion of this

court in *Greenwood vs. Freight Company*, 105 U. S., 13–18, to the effect that the rights of the shareholders of a corporation are not annihilated by a repeal of its charter, but remain to be protected by the courts, Judge Jackson proceeds as follows:

"The principle of these and other decisions upon the subject of amending or repealing charters under a reservation of power so to do is that the legislature may change or modify the privileges and franchises which the State has granted to the corporation and which concern the interests of the public; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the State may not go further, and so legislate as to disturb, affect, or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guaranties higher and superior to the legislative power of amendment or repeal. The decisions in the court of appeals of this State clearly recognize these general principles. Then, in the case of *City of Covington vs. Bridge Co.*, 10 Bush., 76, the court say, in reference to the power of amendment, that 'it is settled by an unbroken line of authority that the charter of a private corporation may vest such rights in the corporators and stockholders that no subsequent legislation can impair or diminish, and it is equally as well settled that such amendments of a charter may be made as are necessary to carry into effect or accomplish the purposes for which the charter was obtained.' So in *Griffin vs. Insurance Co.*, 3 Bush., 594, it is said that 'the proviso (to act of 1856) was intended to secure the rights of beneficiaries and others, vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchises.' See also, *Orr vs. Bracken Co.*, 81 Ky., 596.

"The right reserved by the general statutes to amend or repeal privileges and franchises conferred by the charter is one thing, but the power to take from the stockholders or others rights or property interests, acquired or vested before such repeal or amendment, is another and quite a different thing. The first comes within the legislative authority; the

second lies beyond the limits of such authority, because the legislature cannot defeat or impair other rights previously vested, which have sprung up or grown out of such corporate privileges and franchises while the corporation was allowed to exercise the same."

The foregoing decision is not based in any respect upon the proviso of the Kentucky act of 1856, saving rights vested at the time of the amendment or repeal of a charter. On that point the opinion reads (615):

"In the absence of this clearly expressed intent of the legislature not to affect or impair their rights previously vested, in dealing with the privileges and franchises of corporations by way of amendment or repeal, it is well settled by the authorities that the power of the legislature, under a reservation of the right to alter, amend or repeal charters, is not unlimited, and that under such authority changes and alterations cannot be constitutionally made by the legislature which disturb private contracts or rights acquired under such charters before the power of amendment or repeal was exercised."

In *L. & N. R. Co. vs. McCord*, 103 Fed. Rep., 216, on application for preliminary injunction, it was held that an act of the legislature of Kentucky was void which authorized a commission, on complaint of extortion by any railroad company and after notice to any employé, to fix maximum rates for that road and which further provided that subsequent charges over maximum rates should be a criminal offense. It was also held as to one of the railroads concerned that, even if the legislature had authority to repeal its charter, the act was not an exercise of the right of repeal.

An act of the legislature of New Hampshire undertook to foreclose a mortgage given by a railroad corporation of that State on its property. The right to do this was asserted under a reservation in the company's charter of the right to amend or repeal; but the court held the contrary, saying:

"Calling the legislative act of incorporation a grant, and the legislative act of amendment or repeal a modification or

revocation of the grant, does not convey to the legislature a power that is not legislative, nor bestow the character of legislation upon an act not otherwise endowed with that character, nor authorize either branch of the government, or all the branches combined, to make a special decree extinguishing a certain mortgagor's private right of redeeming certain property for the benefit of the mortgagee, or extinguishing the mortgagee's private right of foreclosure for the benefit of the mortgagor, without consent, without compensation, without trial, and without notice. Such an act is not an exercise of the legislative, the judicial, or the executive power established by the Constitution. It is an exercise of a power not tolerated by the Constitution, because not compatible with the liberty the Constitution was designed to secure. As neither of the branches of government can acquire, by its own act of reservation, any power exclusively vested by the Constitution in either of the others, so neither can acquire, by its own act of reservation, that unlimited power which passed from the British Parliament to the provisional government in 1776, and was abolished in 1784. The legislative effort to protect public interests against a contractual abdication of legislative power, by a reservation making a charter amendable and repealable like other statutes that are not contracts, does not demolish the safeguards provided by the State constitution for private rights, does not unite powers which the constitution has separated, and does not revive the absolutism which the Constitution extirpated nearly a hundred years ago."

Railroad Company vs. Elliott, 58 N. H., 451, 457, 458.

An act requiring railroad companies to furnish free transportation to shippers of stock in certain cases was held void as a substantial impairment of vested rights, "even if it be regarded as an exercise of the reserved power of the legislature to amend the charter." (*Railway Co. vs. Campbell*, 61 Kan., 439.)

In *Miller vs. New York and Erie R. R. Co.*, 21 Barb., 513, an act of the legislature of New York was held invalid which, under a power to alter, modify, or repeal the charter of a railroad company, undertook to require the company at its

own expense to cause a proposed new public highway to be carried across its tracks by a bridge, the court saying:

"The power reserved to the legislature to alter, modify or repeal the defendants' charter did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none such could have existed. It would be preposterous to say that the legislature has the power to make any and every requisition upon the defendants as a condition of their retaining their corporate existence—to require them, for instance, to make donations to the towns through which their railroad may pass, or to any other body politic, or to individuals."

B. *Cases holding that while a State may exclude altogether foreign corporations, a condition of their doing business in the State that they shall give up any right or privilege under the Constitution of the United States is void.*

Before referring to the decisions on this point, it is well to consider the privileges of foreign corporations in the various jurisdictions, State and national, in this country, in the absence of legislation on the subject.

In *Bank of Augusta vs. Earle*, 13th Peters, 519–589, the court laid down the now familiar doctrine that a corporation of one State may purchase bills of exchange in any other State and there sue on them, in the absence of an express prohibition by the latter State. In delivering the opinion of the court Chief Justice Taney goes at length into the existence and the reasons for the comity that "prevails among the several sovereignties of this Union" permitting corporations of one State to contract and sue in the others. In showing that this comity is not merely interstate, but international, he says:

"It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are

concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 36, 37, that: 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.'

"Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State, or injurious to its interests."

In *Christian Union vs. Yount*, 101 U. S., 352, the question was whether a New York corporation having its place of business and principal office in the State of New York could take and hold lands in the State of Illinois. It was claimed that by the settled law of Illinois a foreign corporation could not take or hold lands in that State. Mr. Justice Harlan, delivering the opinion of the court, said:

"In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any

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other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court."

In an action for personal injuries received on a toboggan slide operated in New York by a West Virginia corporation, it was claimed that the individuals in charge were personally liable, because the foreign corporation had no legal power to operate the slide in New York. Mr. Justice Peckham delivered the opinion sustaining the right of the corporation to carry on its business in New York, saying:

"The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts."

Demarest vs. Flack, 128 N. Y., 205, 219.

Although the general incorporation laws of Illinois restricted the organization of corporations under it to certain classes, the supreme court of that State has held that this did not indicate that it was the policy of the legislature to exclude from the State corporations of other States organized for purposes outside of those permitted to Illinois corporations (*Stevens vs. Pratt*, 101 Ill., 206–220; *People vs. Fidelity, etc., Co.*, 153 Ill., 25–38. To same effect, *State vs. Fidelity, etc., Co.*, 39 Minn., 543).

A Michigan statute authorized foreign corporations, on complying with certain prescribed terms, to carry on business in that State. It was held that this did not exclude foreign corporations who had not complied with the terms, as the language of the act was neither "clear nor positive" to that effect (*People vs. Hawkins*, 106 Mich., 479–484).

Surely it need not be argued that the comity in this respect which prevails among all the civilized nations of the

world, and in a marked degree between the sister States of this Union, operates in this District in favor of corporations organized under the laws of those States. This is the one jurisdiction in the United States in which all the States have a common interest. This is the seat of that Government which represents the States themselves and their people. Every tax-payer in the Union contributes directly or indirectly to the maintenance of the local government of the District.

There has never been any statute in force in the District of Columbia suggesting the slightest disposition on the part of Congress to discriminate against foreign corporations. On the contrary, nine out of ten private corporations doing business here are corporations organized under State laws.

As an indication of the policy of Congress as to the relations between the States and the District, it is worthy of note that executors and administrators appointed in the probate courts of the States have been given the right to sue as such in the courts of the District without taking out ancillary letters here (Act of June 24, 1812, 2 Stat., 758; *U. S. vs. Cox*, 18 How., 100; District Code, sec. 329).

The question whether this comity prevails in the *Territories* of the United States has been answered emphatically in the affirmative by this court.

By an act of Congress approved March 2, 1867 (14 Stat., 426), the legislative assemblies of the several Territories of the United States were prohibited from granting "private charters or especial privileges," but they were authorized by general incorporation acts to permit the organization of corporations for mining, manufacturing, and other industrial pursuits.

In an action of ejectment in a court of the Territory of Colorado, the plaintiff derived title through a Pennsylvania corporation whose charter authorized it, among other things, to receive, hold, and grant real estate, explore, locate, and improve lands, transport emigrants and merchandise, con-

struct houses and buildings, and colonize, organize, and form settlements. It was claimed on behalf of the defendant in the case that a foreign corporation with such extensive powers had not the capacity to act in the Territory of Colorado, and to hold and convey real property there, the contention being, as stated by Mr. Justice Field, in delivering the opinion of this court, "that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country, and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory." But Mr. Justice Field thus disposes of this claim:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden."

Cowell vs. Springs Co., 100 U. S., 55, 59, 60, 61.

Assuming that the same rule which applies to the constitutional rights of a State corporation engaged in business in

another State or in a Territory of the United States will apply to it when it enters the District of Columbia for the purpose of transacting the same business here, we proceed to inquire what that rule is.

It has several times been held by this court that a State has no power to require, as a condition precedent to the transaction of business in the State by a corporation organized under the laws of another State, that the corporation shall waive its right to remove to the Federal courts suits brought against it in the courts of the State. (See *Insurance Company vs. Morse*, 20 Wall., 445–458; *Barron vs. Burnside*, 121 U. S., 197–199, 200; *S. P. R. Co. vs. Denton*, 146 U. S., 202–206.) And this doctrine is maintained, although it has also been held that the State may by law provide that upon the removal by the foreign corporation to the Federal courts of a suit brought against it in the courts of the State, its license to do business in the State shall be revoked (*Doyle vs. Continental Insurance Co.*, 94 U. S., 535–540).

In *Norfolk and Western R. Co. vs. Pennsylvania*, 136 U. S., 114, it was held that the State of Pennsylvania could not impose a license tax upon a corporation existing under the laws of Virginia and West Virginia, because under the circumstances of that case it was an attempt to impose "a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commercial clause of the Constitution of the United States."

In *McCall vs. California*, 136 U. S., 104, it was held that a license tax imposed by the State of California upon an agent of a railroad corporation having its principal place of business in Chicago was invalid as a tax upon interstate commerce.

In *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1, it was held that the legislature of Florida could not exclude a telegraph company from any part of that State in the face of an act of Congress which "substantially declares, in the interest of commerce and the

convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege."

In *Crutcher vs. Kentucky*, 141 U. S., 47, it was held that an act of the legislature of Kentucky providing that agents of express companies not incorporated by the laws of that State should not carry on business there, without first obtaining a license from the State, was a regulation of interstate commerce, so far as it applied to a corporation of another State engaged in the express business, and was to that extent unconstitutional and void.

Blake vs. McClung, 172 U. S., 239, involved the question of the validity of a Tennessee statute which authorized foreign corporations on certain conditions to do business in that State and provided that such corporations, upon compliance with such conditions, should be deemed and taken to be corporations of the State. The act further provided that creditors who were residents of the State of Tennessee should have priority in the distribution of the assets of such corporations. It was held that residents of other States of the Union who were creditors of a British corporation and whose claims had arisen out of dealings with the corporation in its capacity as a British corporation were entitled to share equally with residents of the State of Tennessee in the distribution of the assets of the British corporation, notwithstanding the fact that it had availed itself of the benefits of the Tennessee statute. The ground of the decision was that the act was in violation of the second section of the fourth article of the Constitution of the United States, providing

that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.

In *N. Y., L. E. & W. R. Co.* (a New York corporation) *vs. Pennsylvania*, 153 U. S., 628, there was involved the validity of an act of the Pennsylvania legislature requiring a railroad company, when making payment of interest upon its bonds held by residents of Pennsylvania, to deduct a certain tax imposed upon securities of that character by the Pennsylvania statute. The interest on the bonds was all paid in the company's office in New York city, and the question was whether the State of Pennsylvania could require the railroad company to collect in New York for the State of Pennsylvania from the holders of its securities the tax imposed. Long before the act was passed the State of Pennsylvania had authorized the railroad company to extend its line into the State upon its agreeing to pay to the State $10,000 per annum. It was held that the statute involved was void because it was an attempt to impair the obligation of a contract entered into between the State and a railroad company under which the latter had extended its line into the State. In this case, however, the reserved right of the State to repeal the acts under which the corporation was permitted to do business in the State was qualified by the condition "if the said company shall misuse or abuse the privilege hereby granted or shall violate any of the privileges of this act."

The legislature of Nebraska passed a law making it a criminal offense for insurance companies in that State to enter into agreements regulating charges for insurance. A number of insurance corporations organized under the laws of other States filed a bill in the circuit court of the United States for Nebraska to enjoin certain State officers from enforcing the statute. The attorney general, besides upholding the constitutionality of the law, alleged that "the complainants are doing business in Nebraska by mere suffer-

ance." As to the last proposition, District Judge McPherson, in deciding the case (September 23, 1901), said:

"The showing both by the allegations of the bill not put in issue and the proofs is to the effect that by legislation for a great many years in force, and still in force, in Nebraska, foreign insurance companies were invited to go into Nebraska and do a fire-insurance business. This was done, no doubt, partly by reason of comity to other States, but no doubt largely to enable the citizens of the State to have competition generally, and particularly as to large risks in the cities. The companies went into the State, and for many years paid large sums to the State, and additional large sums in advertisements, establishing offices, agencies and other necessary expenses. The present attorney general, in his argument, strongly and with much ability and force urges for my consideration the case in the United States Supreme Court of *Paul vs. Virginia*, 8 Wall., 168; 19 L. Ed., 357. I agree with him that that case and many other like cases hold—that foreign insurance companies cannot do business in Nebraska excepting by and with the consent of the State of Nebraska. To that effect the law is well settled. If the State of Nebraska by legislation makes it more onerous for foreign insurance companies, there can be no doubt about the validity of such legislation. Their license fees can be increased. Their local agents can be required to pay fees. The laws can be made more rigorous as to suits brought against them. They can be required to name in the State or in every county a resident attorney upon whom process can be served. Many other exactions can be required. And the fact that the foreign company has heretofore been licensed is no answer to such new legislation, and all foreign companies can be excluded from the State. But that is not the question before me for decision. If it were, I would sustain the contention of the attorney general. These companies have been, by legislation, invited to come into the State. They are here, and here lawfully. They are complying with all requirements of the State, unless it be the requirements of the statutes in question. They being here by invitation, and complying with all legal requirements, as they say, it cannot be exacted of them that they comply with illegal requirements, because an illegal requirement is

none at all. An unconstitutional statute is no law. It seems clear to me that the complainants have the right to challenge these statutes."

The court then proceeded to hold that the act was void because by unlawfully interfering with the right to contract it deprived the complainants of liberty without due process of law.

Niagara Fire Ins. Co. vs. Cornell, 110 Fed. Rep., 816.

In support of the proposition that because the appellant is "doing business in the District of Columbia upon sufferance" a statute requiring it to furnish telephone exchange service at "ruinously low" rates is valid, Mr. Justice Shepard cites *Paul vs. Virginia*, 8 Wall., 168, and *Waters-Pierce Oil Company vs. Texas*, 177 U. S., 28; but by necessary implication both these cases are directly opposed to the proposition stated. In *Paul vs. Virginia* Mr. Justice Field devotes the whole of the opinion to showing that the statute complained of did not violate any provision of the Federal Constitution, because (1) corporations are not citizens within the meaning of article 4, section 2, of the Constitution, and (2) requiring foreign insurance companies to deposit bonds with the State treasurer was not an interference with interstate commerce. And in *Waters-Pierce Oil Company vs. Texas*, Mr. Justice McKenna concludes the opinion by saying that the oil company was confronted with this dilemma: The act complained of (which forfeited the charter of domestic corporations and the right to do business in the State of foreign corporations upon their entering into a "trust," as defined by the statute) was either constitutional or unconstitutional. If it was constitutional, the company had no legal grievance; if it was unconstitutional, it was wholly void and did not affect a prior act which was concededly valid and which covered the case.

In neither of these cases would there have been any occasion for the court to pass upon the constitutionality of the

statutes involved, if the position of the court below in this case is correct. All that the court need have said in that case was that if corporations of other States undertake to do business in Virginia or in Texas they must submit to *any* conditions imposed by the State or "withdraw," and that precise question was not decided in either of those cases for the manifest reason that it did not occur to the counsel who represented Virginia and Texas respectively, or to the court, that a State may take the property of a foreign corporation without due process of law.

The case of *Smyth vs. Ames*, 169 U. S., 466, of itself would seem to be decisive of this question. In that case the bill was filed by several corporations. Some of them were organized under the laws of Nebraska and some under the laws of other States. One was organized under a charter from Congress. They all complained that the maximum rates fixed by the Nebraska statute were unreasonably low; that under those rates they could not carry on their local freight business except at a loss. The Court of Appeals of this District would have said to the corporations of the other States, "Accept these rates or withdraw from the State of Nebraska;" but this court made no such distinction.

There are two other cases only, so far as we know, in which the doctrine laid down by the Court of Appeals in this case has ever been urged upon any court in this country. One of these cases is *Chicago and Northwestern Railroad Company vs. Dey*, in the United States circuit court for the southern district of Iowa (35 Fed. Rep., 866; 1 L. R. A., 744–752), decided by Circuit Judge Brewer, now Mr. Justice Brewer of this court. In that case the question was whether an act of the Iowa General Assembly was valid which prescribed certain maximum rates for railroad transportation in the State. Mr. Justice Brewer, in granting a preliminary injunction, said:

"It is said that the complainant is a foreign corporation, permitted simply as an act of grace to do business in this

State, and that the legislature may therefore impose such terms and conditions upon its doing business in the State as it sees fit; that the carrier is not bound to continue in business, and if it finds the rates imposed by the State not remunerative may abandon the business. Whatever of force may be in such arguments as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed.

"For a government, whether that government be a single sovereign or one of the majority, to say to an individual who has invested his means in so laudable an enterprise as the construction of a railroad, one which tends so much to the wealth and prosperity of the community, that, if he finds that the rates imposed will cause him to do business at a loss, he may quit business and abandon that road, is the very irony of despotism. Apples of Sodom were fruit of joy in comparison.

"Reading, as I do, in the preamble of the Federal Constitution, that it was ordained to 'establish justice,' I can never believe that it is within the power of State or nation thus practically to confiscate the property of an individual invested in and used for a purpose in which even the Argus eyes of the police power can see nothing injurious to public morals, public health, or the general welfare."

The other case is *Southern Pacific Railroad Company vs. Board of Railroad Commissioners*, 78 Fed. Rep., 236, in the California circuit. The attorney general of the State urged that the act of the California legislature involved in that case, which fixed maximum rates for railroad transportation in the State, was valid as to the domestic corporations of California because of the reserved right to amend their charters, and as to foreign corporations because it simply imposed a condition upon their continuing to do business in the State. On this point Mr. Justice McKenna, who heard the case, held that the reserved power to amend charters of corporations is not a power to withdraw from them the

guarantees of the Federal Constitution, nor to affect any rights not given them solely by their charters (p. 253 *et seq.*).

On this branch of the case we submit, therefore, that the following principles are established:

1. State statutes prescribing maximum rates for public-service corporations which are unreasonably low are void because they amount to taking property without due process of law, which the States are prohibited from doing by the fourteenth amendment to the Constitution.

2. A similar act of Congress is also void, because by the fifth amendment the United States is prohibited from taking property without due process of law.

3. The fact that a State, as to its domestic corporations, by amending or repealing their charters where that right is reserved, and as to other corporations by excluding them from the State altogether, may at any time put an end to their transacting their business in the State does not give the State the right to prescribe as a condition of their continuing their business in the State that they shall submit to having their property taken without due process of law.

4. The Constitution is in full force and vigor in the District of Columbia. Congress has the power here to terminate the existence of domestic corporations under the reserved right to repeal, and of putting an end to the business of other corporations in the District by excluding them therefrom, but this power is subject to the same limitation that restricts the States. It cannot therefore lawfully provide that a corporation created by it, or a State corporation, lawfully doing business in the District, shall cease to transact business in the District unless it submits to having its property taken without just compensation or without due process of law.

C. *The assumption made by the Court of Appeals that the act of Congress is tantamount to a direct legislative condition that the company must accept the rates imposed or withdraw from the District is also unwarranted and erroneous.*

The action of Congress does not contemplate any such result. It is to be presumed that the act was intended to impose reasonable rates. The court will not assume, nor will it be asked by us to assume, that Congress intended to require the company to do business at a loss as a condition of being allowed to remain here. Congress in fixing the rates simply made a mistake in fact in supposing that the rates fixed would be remunerative, but it did not intend to confiscate the property or franchises of defendant. Such an intentional act of injustice will not be attributed to the legislature.

The act contemplates the continuance, not the discontinuance, of business in the District. Indeed, the very relief demanded in this suit is that the company shall continue to furnish telephone service precisely as before the passage of the act.

No doubt it is the right of the defendant to withdraw and cease business here if it finds the regulations intolerable, but nowhere is such a condition expressed or implied in the action of Congress. That right exists at all times and independently of the action of Congress. In this respect the telephone company is not differently situated from any domestic corporation in its own domicile. If a State adopts regulations of business or rates so onerous or oppressive that a company cannot profitably submit to them, it may go out of business, but that is a result of the regulations that cannot be said to have been in contemplation of the legislature. It is in no way similar to a condition contained in the charter of the company which by the acceptance of the charter the company has assented to.

If this telephone company when it received permission to

do business in the District had been put upon stipulated terms as to the rates it should charge, it could not have refused to abide by its agreement, except on withdrawal from the District.

But, coming here without any such previous conditions, it had a right to insist that no rates except such as are reasonable should be imposed, and that is precisely what it now contends for.

The court below obviously confused the question of terms imposed by the Government as a condition of doing business and the privilege of the company to cease doing business when its interests required it to do so.

The company has not been ordered out of the District; on the contrary, it has under present law a legal right to stay, and while it chooses to stay it may defend itself against legislation which impairs its constitutional right to do business for remuneration that is in excess of its necessary reasonable expenses.

The ground upon which the Court of Appeals decided this case against the appellant is therefore erroneous, and we are remitted to the question of fact whether the rates for telephone exchange service fixed by the act of June 30, 1898, are unreasonably low, as was held by Mr. Justice Barnard and as was assumed for the purposes of its decision by the Court of Appeals.

2. *The act of Congress in question is void because it applies to telephones on private lines as well as to the telephone exchange business.*

The act of Congress undertakes to make it unlawful for any person or any telephone company doing business in the District to charge or receive more than the rates which it prescribes for the use of a telephone. It is common knowledge, and the evidence in this case fully shows (96, 345, 1162), that a great many tele-

phones are used in the District which have no connection with any telephone exchange, and are not related in any way to the system which employs the public agencies of streets, &c., for its operation. Under the doctrine laid down by this court in *Munn vs. Illinois*, 94 U. S., 113, and *Budd vs. New York*, 143 U. S., 517, it cannot be disputed that Congress has the right to prescribe reasonable rates for the telephone exchange business in the District, because the telephone when used in connection with an exchange is "devoted to a use in which the public has an interest" (*Cotting vs. Stock Yards*, 183 U. S., 79). We think it may safely be assumed that it will not be contended in this case that Congress has the right to prescribe the rates for the use of telephones not connected with any public exchange. It could with as much reason be said that it has the right to fix the price of a loaf of bread; but this statute in plain terms undertakes to fix a maximum rate of compensation for the use of a telephone in any way and by anybody in this District, and for that reason alone it is void. Although this point was presented fully to the court below in our brief and in the oral argument, it is not referred to in the opinion of the court.

3. *The act is unconstitutional and void because it undertakes to impair existing contracts between the Government and the appellant and between the appellant and private parties.*

Our contention upon this point seems to have been misunderstood by the Court of Appeals. Mr. Justice Shepard assumes that the contract which the appellant claims this act impairs is a supposed contract between Congress and the appellant that the latter should have the right to carry on the business of a telephone exchange in the District; but the contracts to which this assignment of error refers are contracts between the Government and the appellant and between the appellant and private persons for telephone

exchange service. The evidence shows that at the time the act was passed there were in use in the District by the Government several hundred telephones connected with the exchange, for which the Government was paying rates running as high as $140 to $500 per annum, the last-mentioned figure being the rate paid for a telephone at the Government Hospital for the Insane (267–277). The contract between the appellant and the appellees in this case is in the record (10–13). The contracts with the other subscribers whose cases have been consolidated with this case are in the same phraseology (434), except, of course, that different contracts provide for different kinds of equipment or different kinds of service (434–437). The contract with the appellees bears date July 1, 1897, and was for the use of the equipment described "until the 1st day of July, 1898, and thereafter until this agreement is terminated by a ten days' notice in writing given by either party to the other" (13).

Of course, when the act was passed there were many cases in which the year had not expired. This act of Congress was approved on the 30th day of June, 1898, and, if it had any validity at all, it went into effect immediately. The giving of the ten days' notice could not remedy the defect in the act resulting from the absence of any requirement for such notice. From that day, therefore, if the act stands, the United States, for telephones which it had taken and agreed to pay for at varying rates, many of them being in excess of the maximum rate fixed by the statute, had the right to retain these telephones and pay the rate fixed by the statute, while it also had the right to retain telephones which it had taken at rates lower than those fixed by the statute without any corresponding right on the part of the appellant to raise to the maximum fixed by the act the actual compensation therefor.

And so as to contracts between the appellant and subscribers other than the Government, no matter whether the

year had expired or not, and without reference to the ten days' notice required, the subscriber who had agreed to pay more than the statutory rates was at once relieved from the excess, the appellant remaining bound to furnish the service; while the persons who had been fortunate enough to secure telephones at rates lower than those fixed by the statute could enforce their contracts and demand the prescribed service at the contract price. Thus the act, if valid, at once destroyed several hundred contracts between the Government and the appellant and hundreds more between the appellant and its individual subscribers.

These contracts were property; for their fulfillment the company had made special expenditures, and the destruction of them in this way is the taking of property without due process of law, in violation of the fifth amendment.

It is not necessary in this connection to look beyond the plain terms of the fifth amendment for a constitutional objection to an act of Congress having such an effect; but if it were necessary we would confidently maintain that although there is no express provision in the Constitution prohibiting the United States from passing any act impairing the obligation of a contract, it is because, as Mr. Justice Strong said, speaking for himself and Justices Field and Bradley, in *Union Pacific Railroad Company vs. United States*, 99 U. S., 700–736:

"No necessity existed for imposing such a limitation on the power of Congress. * * * Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified and those vested by the Constitution in the Government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the Government, or any grant of power to destroy vested rights."

It is true that this quotation is from the dissenting opinion of the three justices named, but there is nothing to the contrary in the opinion of the majority of the court in that case.

Indeed, Mr. Chief Justice Waite, in delivering the opinion of the majority of the court (page 718), said the United States cannot, any more than a State, interfere with private rights, except "for legitimate governmental purposes. * * * The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

This court has frequently had occasion to intimate, if not to expressly decide, that there are certain fundamental principles of justice which limit the power of any legislature in this country, State or national, without regard to express restraints found in written constitutions.

Thus in *Calder vs. Bull*, 3 Dall., Mr. Justice Chase, on page 388, says:

"An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punishes a citizen for an innocent action or, in other words, for an act which when done was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them."

So Mr. Chief Justice Marshall, in *Fletcher vs. Peck*, 6 Cranch, 87–135, a case in which a State legislature by the

repeal of a law had undertaken to divest a vested interest in property, said:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found if the property of an individual fairly and honestly acquired may be seized without compensation?"

In the *Legal Tender cases*, 12 Wall., 457, the court says (page 549):

"We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not."

In *Osborne vs. Nicholson*, 13 Wall., 654, this court held that a promissory note given for the purchase of a slave in 1866 was collectible in 1869, notwithstanding the fact that in the meantime, by the thirteenth amendment to the Constitution, slavery had been abolished. Mr. Justice Swayne, in delivering the opinion, said:

"Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital ends of government."

In *Loan Association vs. Topeka*, 20 Wall., 655–662, it was held that an act of the legislature of Kansas was void which authorized taxation by cities in aid of certain manufacturing enterprises not of a public character. Mr. Justice Miller, in delivering the opinion in that case, said:

"It must be conceded that there are such rights in every free government beyond the control of the State. A gov-

ernment which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all, but a despotism. It is true it is a despotism of the many—of the majority, if you choose to call it so—but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

In *Chicago, Burlington, etc., R. R. Co. vs. Chicago*, 166 U. S., 226–238, the question involved was as to the right of a railroad corporation in Illinois to compensation for the condemnation for a right of way of the public across its tracks. Mr. Justice Harlan, delivering the opinion, quotes with approval the language of Chief Justice Marshall in *Fletcher vs. Peck*, and of Mr. Justice Miller in *Loan Association vs. Topeka*, and adds:

"In the early case of *Gardner vs. Newburgh*, 2 Johns. Ch., 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temper-

ate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson vs. Johnson*, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its State constitution.'"

The precise question whether Congress has power to impair the obligation of a contract because, unlike the States, it is not prohibited by the constitution from doing so, was considered by the supreme court of Kansas in the case of *The Territory vs. Reyburn*, 1 Kan., 551–557, and was thus disposed of by that court:

"It is argued that the provision of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of a contract, does not extend to or include the Congress of the United States, and hence, as they are not forbidden, they may pass such laws. This is an extreme error, and grows out of a misunderstanding of the organization and structure of our Government, and is predicated upon the erroneous idea that the General Government is an original sovereignty. The separate States were original sovereignties, and may have had power, as such, to impair the obligation of contracts, until they formed the Constitution, by which they voluntarily prohibited themselves from the exercise of it, the existence of which right will be doubted, and the use of it was always deservedly condemned by all good and just men. The General Government is not an original but a derivative sovereignty, upholding such powers only as are granted to it by the Constitution, or such as necessarily arise and follow from those specifically granted. The General Government is a delegated agent, with the Constitution in its hand as its

warrant of attorney, beyond whose provision it cannot go in its action. The Constitution will be searched in vain to find a special grant of power to impair the obligation of a contract; and who shall justly say that this power, immoral in itself, and abhorrent to every man's sense of natural justice, is a necessary implication arising from the powers granted? We deny it."

4. *The act is unconstitutional and void because it fixes a single maximum rate for various kinds and amounts of service and different kinds of equipment, the telephone exchange business being one in which classification of service and equipment is essential in fixing reasonable rates to be charged different subscribers. In other words, the validity of the act depends upon the reasonableness of the rates as applied to subscribers with the best equipment and receiving the greatest amount of service.*

We presume it will not be questioned that an act of a State legislature or of Congress fixing maximum rates for sending telegraph messages, which prescribed the same maximum annual charge for the man who sends one telegram a year and for the corporation that sends one hundred telegrams a day, would be void unless the rate fixed was reasonable in the latter case. We assume also that if Congress should undertake to provide that the electric lighting companies of Washington should furnish light to every customer at a maximum rate not exceeding twenty dollars per year, that the validity of the act would depend not upon whether twenty dollars would be a fair average for all the companies' customers, whether he required light for a single room or for a hotel of five hundred rooms, but upon whether that rate would be a fair one for the hotel proprietor and other large users of electric lighting. So also as to a water-supply company. Or, as a final illustration, we take it for granted that an act prescribing rates for the carrying of freight by railroad companies, which fixed the same maximum rate per pound for all classes of freight from lead to

feathers, would be subject to the same reasoning. In all these cases it would be manifestly impossible under such a system of charges to collect anything like the maximum compensation from anybody but the large users or customers, or for the carrying of heavy articles of freight; so that while the statute upon its face would purport to give a fair average rate of compensation, it would in actual operation be a maximum rate for only the few who would profit by taking advantage of it.

The act of Congress involved in this case makes no distinction whatever between the subscriber who uses his telephone but once a day and the subscriber who uses it a hundred times a day. It appears by the evidence that in 1898 the appellant had nearly seventy business subscribers who used their telephones on an average of from 5,700 to 31,500 times a year (81, 82). There were about thirty Government telephones in ten private exchange stations, composed of not exceeding five telephones each, in which the actual number of calls from each station averaged from 11,200 to 60,300, or at the rate of 6,350 calls per telephone per annum. The telephone in the Library of Congress alone made 13,200 calls a year (83). The maximum number of calls per annum for any one subscriber at about the time the testimony in this case was taken was 31,500 (82). Under this act there is no limit to the number of calls which any subscriber may require. A glance at the table on pages 81 and 82 will show that a very few subscribers, such as the Knox Express Company, the railroad freight stations, and W. B. Moses and Sons, would keep one operator busy attending to their calls during the business hours of the day, and the rates fixed by this statute would hardly enable the company to pay the compensation of the operator alone. Manning, the appellee, used his telephone to the extent of about 7,500 calls a year.

The distance of the subscriber's station from the central office is another important factor. Many of the subscribers

are within a stone's throw of the central office, others are several miles away, the average distance in this District of the subscribers from the central office being one and nine-tenths miles (1069, 1074, 1075). The cost of connecting one of the distant subscribers with the central office will often be more than a hundred times the cost of connecting the subscriber whose place of business is in the same block.

When the act went into effect about three-fourths of the subscribers had the grounded-circuit connection—that is, a single iron wire was used to reach the subscriber and the circuit was completed through the earth (136). The remaining one-fourth of the subscribers had the complete metallic circuit of copper wire. The cost of the copper wire per mile of wire is five times that of the iron wire, and, a double wire being required for the metallic circuit, the expense of this one item alone of equipping the metallic-circuit subscriber was ten times that of the grounded-circuit subscriber (144, 186).

There is the same difference in the inside equipment of subscribers' stations. One has the plain, ordinary wall equipment, others have the wall cabinet, and still others the desk cabinet. When this act was passed practically all the subscribers who had the grounded-circuit service were furnished with the telephone instrument known as the Blake transmitter, while those who had the metallic-circuit service of copper wire were supplied with the long-distance instrument known as the Bell "solid back." The varying kinds of equipment and the extra rates charged for the better equipment are shown in the testimony of the contract clerk, Mr. Hubbard, on pages 434 to 436. The Maryland commission, heretofore referred to, reported to the legislature that the cost to the appellant of the metallic service per subscriber in Baltimore was about 33⅓ per cent. more than that of the grounded-circuit service (51).

In their bill of complaint the appellees aver that under a contract in writing between them and the appellant they

had up to the 1st day of July, 1898, been receiving telephone exchange service for which they had been paying $145 a year, with a discount of $12.50 from each quarter's rent for prompt payment (4). The contract itself, a copy of which is annexed to the answer in the case (13), shows that the equipment furnished under it consists of "one magneto telephone, one 'solid-back' transmitter with necessary battery, and one magneto call-bell, desk cabinet," and "a complete special metallic circuit consisting of two wires."

The decree of the Court of Appeals in this case requires the appellant to continue to furnish the appellees this identical equipment indefinitely in the future for the sum of $50 per annum, thus entitling the appellees to a service and to an equipment far better in every essential respect than three-fourths of the subscribers were entitled to demand, and in some respects better than nine-tenths of the subscribers. The "desk cabinet" (13) is a luxury for which the appellees voluntarily agreed to pay the sum of $10 extra per annum (436), a sum equal to one-fifth of the total annual charge allowed by the act.

The act is also fatally defective in that it makes no provision for message-rate service. In contracts where this service is furnished the subscriber pays for a certain number of calls to be used during the year, with the privilege, if he exhausts that number before the year has expired, of making additional calls at the rate of a few cents each (146, 436). In the Buffalo telephone exchange all the subscribers receive the message-rate service, the flat-rate being unknown there (64). In Brooklyn, Jersey City, and Hoboken, and in the other exchanges within the territory of the New York and New Jersey Telephone Company, 80 per cent. of the subscribers were using the message-rate service in January, 1899, although it was not introduced by that company until 1895 (423). The message-rate service was introduced in the city of New York on June 1, 1894 (1119). Within four years thereafter 85 per cent. of the subscribers in that

city were message-rate subscribers, no less than nine thousand of the former flat-rate subscribers having voluntarily changed to message-rate service (1133).

In this city the message-rate service was introduced in 1896 (146). Six of the appellees whose cases have been consolidated with the case now before the court were receiving message-rate service under contracts of this kind when the act of June 30, 1898, was passed (435).

The public telephones, or local pay stations, are used solely on the message-rate plan. The act of Congress would prohibit the appellant from receiving more than $50 a year for one of these stations, although the reasonable income from it if it were constantly used by the public might be several times that sum.

The necessity of introducing into the telephone business a system of rates by which the amount paid by a subscriber shall bear some proportion to the amount of service which he receives is obvious and is made manifest by the evidence. The uniform custom in this country, in Canada, and in Europe of charging more for a telephone in a business house than in a residence is, as the witness Sargent justly observes, "a rough method of measured service" (424), because in a great majority of cases a business telephone will be used much oftener than a residence telephone.

The telephone exchange business in 1898 was comparatively a new business. It was less than twenty years before that date that such exchanges were established in the principal cities of the United States. The flat-rate system was originally adopted everywhere. Experience soon taught that the flat-rate system is as impracticable and as unfair in the telephone business as it would be in the telegraph business, or in furnishing light by gas or electricity. No one would think of carrying on these other businesses by charging customers so much per year. Certainly the proprietor of a telephone exchange must have the right to contract with one who wishes to become a subscriber to the exchange

on the message-rate plan. That is a right of the subscriber, and to take it away is an injury to both parties. The act in question has no provision for message-rate service. It applies one inexorable rule to the subscriber whose place of business adjoins the exchange and wishes to take grounded circuit, with correspondingly cheap office equipment, and who wishes to buy the right to send a few hundred messages a year, and to the great business firm, which may be a mile from the exchange and which will require the best long-distance equipment, with extra cabinets or desks, and the right, if necessary, to use the telephone a hundred times a day.

In the oral argument of this case before Mr. Justice Barnard counsel for the appellees frankly stated that they themselves considered this act crude and unsatisfactory, and that neither they nor the subscribers' association which they represented had anything to do with its preparation or its passage. Its utter impracticability, we think, is apparent.

It may not be amiss in this connection to mention the fact that in but two other instances has there been an attempt in the United States by an act of the legislature to fix maximum rates for telephone exchange service.

The legislature of Maryland in 1892 fixed the rate to be charged by this appellant at the maximum of $6.50 per month, or $78 per annum, within a radius of two miles from the exchange, with $1 per month additional for every additional mile from the exchange. On April 3, 1894, the act was amended by adding to it the following proviso:

"But any person, firm or corporation may contract in writing * * * with any individual, company or corporation, now or hereafter owning, controlling, managing or operating any telephone line or lines within the limits of this State, for such special form, description and amount of telephone equipment and service, expressed in such contract, as such person, firm or corporation may need, at such rates, and upon such terms and conditions as may be agreed upon between the parties to such contract, and be expressed therein,

but shall not otherwise be entitled thereto; and every form of such special contract * * * shall constitute and be a form of contract for that special telephone equipment and service, into which every other person, firm or corporation in like situation with the person, firm or corporation so contracting * * * shall have a right to enter, in such year, with the party so contracting for such telephone equipment and service; the special contract mentioned in this section shall be entered into before such equipment and service are supplied."

Thus after an experience of two years with the act of 1892, which authorized a maximum charge in Baltimore of $78 per telephone (with a mileage charge added), the Maryland legislature deemed it necessary to provide that the company might contract with its subscribers without any limitation whatever as to price for any special form, description, or amount of telephone equipment and service. The only limitation that this amendment imposed upon the company was that when it made a rate under any such special contract with one subscriber other subscribers should have a right to the same equipment and service at the same rate. This was in effect a legislative declaration that $78 per annum (with a mileage charge added) is too low a rate for good telephone equipment and service in Baltimore.

On April 13, 1885, the legislature of Indiana undertook to fix the rates for telephone-exchange service in Indianapolis at $3 per month; but by an act approved February 27, 1889 (Acts of 1889, page 49), it was enacted by the same legislature:

"That an act entitled 'An act to regulate the rental allowed for the use of telephones and fixing penalties for its violation,' approved April 13, 1885, be and the same is hereby repealed.

"SEC. 2. An emergency existing for the immediate taking effect of this act, the same shall be in force from and after its passage."

Thus, after an experience of four years with the $36 rate in Indianapolis, which time, from the references on page 8 of the brief of the appellant in this case in the Court of Appeals, would seem to have been spent in litigation on the subject, the legislature came to the conclusion that an emergency had arisen requiring the act to be repealed and requiring the repeal to take immediate effect.

5. *To establish the invalidity of the act, the appellant is not required to show beyond a reasonable doubt that the maximum rates fixed are too low.*

In *Chicago, etc., Railway Co. vs. Minnesota*, 134 U. S., 418, it was held that rates fixed for railroad transportation, under an act of the legislature of Minnesota appointing a commission for that purpose, were not binding on the railroad company which was a party to that suit, because the commission had conducted the investigation which resulted in the establishment of the rates without giving the railroad company an opportunity to produce evidence and to be heard on the subject. It is said in the opinion in that case (page 458) that—

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, *is eminently a question for judicial investigation, requiring due process of law for its determination.* If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States."

And if the legislature cannot authorize a commission to fix rates without giving the corporations interested an opportunity to be heard, it is hard to see how the legislature itself

can do so, not only without giving an opportunity for a hearing, but, as is admitted to be the fact in this case (105), without making even any *ex parte* investigation. In each of the cases in this court which are relied upon by the appellees as establishing the doctrine that the court will not interfere, unless the rates are shown beyond a reasonable doubt to be unjust, the statute complained of authorized a full and fair investigation, and such inquiry had actually been had before the rates were established. Thus in *Smyth vs. Ames*, 169 U. S., at page 471, it is said that the act complained of appointed a board of transportation—

"with authority to inquire into the management of the business of all common carriers subject to its provisions, and obtain from them the full and complete information necessary to enable the board to perform its duties and carry out the objects for which it was created. It was also provided that, for the purposes of the act, the board should have power to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to any matter under investigation, and to that end could invoke the aid of any of the district courts or of the supreme court of the State."

So in *San Diego Land Company vs. National City*, 174 U. S., 739, the contention of the land company that it had not had an opportunity for a hearing before the rates were fixed was overruled by this court, with the remark that it appeared by the evidence "that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. * * * They were heard, and there is nothing to justify the conclusion that the case of the appellant was not fully considered before the ordinance was passed." Moreover, in both *Smyth vs. Ames* and *San Diego Land Company vs. National City*, as in most, if not all of the cases in which this question of the burden of proof has arisen, the statute involved provided for a change in the

rates from time to time, on proper inquiry, as circumstances might warrant.

It may well be said that when a legislature has referred to a commission or board of some kind the fixing of rates from time to time as circumstances require, and the tribunal so established, before fixing them, has fully heard and considered all that the public-service corporation concerned can offer by way of evidence or argument, the court should require a very clear showing that the rates are unjust. But such a doctrine can have little, if any, weight where the commission acts without notice to the party chiefly concerned, and it should have no application at all where the rates have been fixed arbitrarily, without any inquiry or investigation of any kind by any board or commission or by the legislature itself. The analogy is close between such a proceeding and an act of the legislature condemning land for public use and at the same time undertaking to declare what the owner shall receive for it.

In the case of *Water Works vs. San Francisco*, 82 Cal., 286 (which case was largely relied upon by this court in *San Diego Land Company vs. National City*, 174 U. S., 739–749), the supreme court of California deals as follows with the proposition that rates may be fixed without a hearing and without an investigation:

"But it seems to us that this complaint presents an entirely different question from this. The whole gist of the complaint is, that the board of supervisors have *not* exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be

without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud, which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. *It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public.*"

6. *It is not enough that under the rates fixed by the act the appellant would earn some profit. It is entitled to a reasonable profit, which would include, among other things, six per cent. (the legal rate of interest in the District of Columbia, where there is no agreement on the subject—sec. 713, Rev. St. D. C.) on the value of its property, tangible and intangible, actually and necessarily used in its exchange business in the District.*

This question seems never to have been passed upon explicitly by this court. In all the later cases on the subject it is assumed that a public-service corporation is entitled to a "reasonable" or "fair" profit or compensation. In the case of *Cotting vs. Kansas City Stock Yards Company*, 183 U. S., 79, the opinion of three members of the court is expressed that rates will not necessarily be unreasonable because a large profit is made on a large business, provided the charge made for particular services is fair, considering the benefit of the services to the person for whom they are rendered.

There is, however, one case in which it has been intimated that if the statutory rates will yield *any* profit, the courts cannot interfere. We refer to the case of *Railroad Company vs. Dey*, 35 Fed. Rep., 866. That case was decided by Circuit Judge Brewer, who, as a member of this court at the present term, delivered the opinion in *Cotting vs. The Stock Yards Company.*

This question has been passed upon directly by another member of this court in *Southern Pacific Railroad Company vs. Board of Railroad Commissioners*, 78 Fed. Rep., 236. In that case the attorney general of California insisted that if the rates fixed would yield the railroad company any profit whatever, they must stand. But Mr. Justice McKenna said:

"This is claimed to be established by authority. I do not think so. It seems to have been decided in the Dey case, 35 Fed., 866. But the same learned judge who expressed that view in the Dey case retracted it in the Ames case, 64 Fed., 165, and it has received no judicial sanction since. This was inevitable when it came to be seen that the regulation of rates could not be an absolute legislative prerogative. When the power of judicial review was asserted and entertained, the fourteenth amendment of the Constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative. Certainly not the judicial prerogative. That must apply justice as it is understood of men, and, in its clear light, it was inevitable that it would come to be seen that the fourteenth amendment of the Constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value—if its guaranties of the law's equal protection to all persons would be satisfied as to railroads by leaving them a microscopical profit. If so, the pool of Tantalus would lose its force to illustrate excited and disappointed expectation when compared with the organic law of this great land. We should keep in mind that the regulation of a railroad affects, in reality, the natural persons who own it, not the insensible legal artificiality and abstraction called a 'corporation.' For the natural persons the protection of the Constitution is intended, and would any one say that justice is done them if their investment be allowed only an infinitesimal fraction of 1 per cent., while all other investments are expected to return, at least, legal interest, with freedom, besides, of unlimited advantage."

A similar conclusion was reached by District Judge Seaman in *Milwaukee Elevated R. R. Co. vs. Milwaukee*, 87 Fed. Rep., 577–585, a case involving the validity of an ordinance reducing the fares of street railroad companies in Milwaukee. After stating that certain computations which had been submitted to him showed that at the rates fixed the company would earn from .032 to .072 per cent. per annum on its investment, Judge Seaman said:

"The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market as shown by the uncontroverted testimony, is 6 per cent. for real-estate mortgages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent. named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent. above that, with the large margin for depreciation left out of account."

So in *Ball vs. Rutland R. Co.*, 93 Fed. Rep., 513, a case involving the validity of a State law regulating charges for transportation, District Judge Wheeler said:

"The two per cent. dividends on the preferred stock without any dividend reaching to the common stock would seem to be far within a reasonable return upon the investment of the stockholders and far below what the legislature could regulate away. This meager profit would be the property of the orators of which the legislature could not deprive them by giving it, or one-half of it, to such part of the public as would use the road."

Clearly reasonable compensation for services rendered the public stands on the same footing as just compensation

for property taken for the public, and the one can no more be frittered away than the other. Each, as this court has over and over held, is a question for *judicial* determination.

The just rule to which the judicial mind must eventually come is that reasonable compensation includes a reasonable profit to the investors. What is a reasonable profit must depend in each case on the circumstances. Ordinarily it will equal the legal rate of interest on money, but in cases of what may be termed pioneer enterprises, where enterprises and industries are undertaken in the infancy of an art or a science and success is doubtful or long delayed, and great expenditures are involved for periods in which no profit is earned, reasonable compensation may be much more than the mere ordinary interest rates on capital.

If it be a just and reasonable expectation that for the risk, the care, the skill that establishes and maintains a business of a quasi-public nature dividends of, say, 5 per cent. per annum should be earned and received by the investors, then a legislative regulation which necessarily reduces that dividend to 2 per cent. is *pro tanto* a taking of the investors' property quite as clearly as though the regulation deprived them of all profit.

This particular business belongs to the class of pioneer enterprises, and the stockholders are entitled to profits commensurate with the risk, the delay, the skill, the genius in invention and discovery which have combined and contributed to add this wonderful convenience to the world's stock of business appliances and facilities.

It is submitted that a profit of 6 per cent. per annum is the very minimum amount which can reasonably and justly be allowed on the capital employed in this company's business.

It is urged that the services and facilities furnished by the appellant to the complainants are reasonably worth a sum which will produce profits to that extent.

Canada Southern Railway Co. vs. International Bridge Co., 8 App. Cases, L. R., 723, 731.

Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, 95, 96, 97.

The appellees make about 7,500 calls a year (see page 82, where C. F. Manning is a misprint for J. F.). They paid under their contract for this service $135 a year, or at the rate of about 1¾ cents per call. Under the statute they would pay $50, or ⅔ of a cent a call.

II.

QUESTIONS OF FACT.

1. A TELEPHONE EXCHANGE SUPPLYING REASONABLY EFFICIENT SERVICE TO ALL PARTS OF THE DISTRICT OF COLUMBIA CANNOT BE MAINTAINED AND OPERATED WITHOUT LOSS AT THE RATES FIXED BY THE ACT OF JUNE 30, 1898.

We do not agree with counsel for the appellees that in considering the validity of the statute in question the particular situation of the appellant should be dismissed from consideration. They contend that even if the Chesapeake and Potomac Telephone Company will necessarily sustain a loss by doing business at the statutory rates, it must accept those rates because it is said that some other company, with different apparatus, could render the service required and make a reasonable profit. If the case required it, we should earnestly insist that since the exchange operated by the appellant is the only exchange plant that has ever been established in the District, and since no other exchange could be established now without affirmative action on the part of Congress, it must be assumed that the act of June 30, 1898, was intended to apply to the appellant company and to no other person or corporation. But this, as it seems to us, is a moot question because, as we confidently submit, the evidence in this case upon which we rely to show that the act in question, if enforced against the appellant company, would be a virtual confiscation of its property, also demonstrates that the act would have the same effect upon any other company that would undertake to render service of the same class to the people of the District of Columbia.

We proceed, therefore, to the consideration of the one great question of fact in this case, and that is whether, under the conditions that exist in this District, it is possible to operate a telephone exchange connecting subscribers all over the District at annual rates, varying from $25 to $50 per subscriber. As we proceed with the discussion, we shall see that the same evidence which shows that the appellant would be ruined by attempting to carry on its business at the rates fixed by the statute will show that the business cannot be carried on at all without a loss unless the rates are far higher than the maximum rates allowed by the act of Congress in question.

The business of the appellant has been economically conducted and its books of account have been properly kept.

It is established by the uncontradicted evidence in the case that the appellant has conducted its business in as careful and economical a manner as possible; that the heads of its several departments are faithful and competent men; that in making all its purchases of material, wherever competition is possible, it buys from the lowest responsible bidder; that in its purchases where competition is impossible it gets as low rates as any other purchaser, and has a special contract by which, if prices go down, it is to get the benefit of the reduction, and, if they go up, its prices are not to be affected; that all material is carefully accounted for, being charged to the storekeeper when received by him and duly receipted for by the heads of the departments to whom it is delivered; that the board of directors passes upon every expenditure, large or small, and generally that every possible safeguard is thrown around its financial transactions so as to keep its expenditures at the lowest point consistent with good service (Bryan, 141; Crenshaw, 175, 177, 185, 189; Crandall, 213, 220, 222; Upperman, 256; Steers, 264, and McFarlane, 962).

The uncontradicted evidence also establishes that all the officers and employés are necessary, and that their compensation is reasonable (Bryan, 139, 142; Crenshaw, 176, 181, 200; Crandall, 215; Nevius, 228, 245; Steers, 264). Lists of the officers and employés, with their respective salaries and wages as the pay-rolls stood on three different days in 1898, are produced by the book-keeper, De Saules (378, 72).

Since in ascertaining what are the proper expenses and receipts in such a business as this our main reliance must be upon the books of account, it is of the first importance to ascertain how these books have been kept. On this subject Haskins, one of the two expert accountants who examined the books, says:

"We found the accounts of the company in very good shape, and we found that the system that they used in handling their accounts was a proper one. They were consistent in following out the rules which they had adopted" (343).

This was in reference to his first examination for the six years from 1892 to 1897, inclusive. He testified that when he made his subsequent examination of the books for the period between January 1 and September 30, 1898, "that they were in as good condition as before" (352).

Tompkins, the other expert accountant, testifies on this subject:

"The system of accounting adopted by the company is remarkably thorough, clear, and scientific. * * * I think they have as good and thorough a system as any corporation I have ever examined. * * * It has been thoroughly carried out and is a very clear statement of the operations of the company" (442).

De Saules, who for several years had been chief clerk of the auditing office of the company and for a considerable period acting auditor, in which capacity he had general supervision of the accounts of the company, says that in keeping the accounts the utmost care was exercised (376).

He had had seventeen years' experience as an accountant in the Treasury Department, and gives it as his opinion that the appellant's system of book-keeping is a good one (376).

It has been the custom of the appellant ever since its organization to have its books and vouchers examined by some licensed auditor or accountant once each year, and to have the result of such examination submitted to the officials of the company.

The testimony of Haskins and Tompkins, as well as that of the officers of the company, Messrs. Bryan, Crenshaw, Crandall, Nevius, Upperman, Steers, and De Saules—indeed all the testimony on behalf of the appellant which involved directly its expenses and receipts—was taken in its principal office in Washington. Its books, vouchers, and papers generally were at the service, and open to the inspection of, counsel for the appellees. They were informed that any information that could be obtained from these books, vouchers, and papers if not voluntarily put in evidence on behalf of the appellant would be furnished on their demand. On different occasions during the taking of the depositions they exercised this privilege by calling for such information (161, 163, 164, 167, 169, 170, 171, 191, 199, 210, 240, 244, 260, 277, 305, 308, 390). In every instance the information which they called for was furnished either at once or as soon as it could be collated (164, 165, 166, 199, 204, 205, 206, 260, 261, 262, 267).

Throughout the cross-examination of these witnesses it will be seen that counsel, either expressly or tacitly, admitted the correctness of the showing made by these books of account. Indeed, in the argument of this case in both courts below, counsel for the appellees frankly stated that they admitted that the showing made by these books and by the statements made up from the books by Haskins and Tompkins, which are in evidence, were correct expositions of the financial transactions of the appellant during the period which they covered.

If adverse counsel had had any doubt on this subject, it is

obvious that they would have had these books subjected to an examination by an accountant selected by them. At the least they would themselves have called for the books and made an examination of them. Certainly no public-service corporation called upon to make a fair and full exhibit of its receipts and expenses for the purpose of enabling a court to determine what is fair compensation for the service which it renders, and what rates would amount to confiscation of its property, could have done anything more than has been done in this case by the Chesapeake and Potomac Telephone Company.

The books of account of the appellant and its original vouchers have been thoroughly examined by the most competent expert accountants in the United States, and this examination shows that the necessary expense, per subscriber, of maintaining and operating the appellant's exchange in Washington is far greater than the maximum rates fixed by the act of Congress.

Charles W. Haskins had been engaged in business as an accountant since January 1, 1886. The varied and important employments which he had had in that capacity are set forth in his testimony (340). When the Congress of the United States appointed a joint commission to reform the method of keeping the financial accounts of the Government, that commission selected Mr. Haskins as their chief expert, and he and his partner, Sells, conducted the investigation and made recommendations upon which the bookkeeping methods of the Treasury Department, Post-office Department, and Interior Department were reorganized (340). He was also appointed by Mayor Strong, and again by Comptroller Fitch, to make investigations as to the accounting methods of New York city (341); and when, on the 28th day of February, 1898 (106), the Senate directed its Committee on the District of Columbia to investigate the appellant company, that committee at once selected Has-

kins as its expert and directed him to make an examination of the books of the appellant, instructing him at the same time on what lines to proceed with his inquiries and what information to furnish (341). When that committee was discharged from further consideration of the subject, but a few days after Haskins had begun his work, the appellant itself instructed him to proceed with the investigation (153). This examination was begun in March, 1898, and covered the six years from 1892 to 1897, inclusive.

John A. Tompkins for 25 years had been engaged in the management of trust estates and as financier and public accountant. His duties as an accountant have required him to make investigations of steam railroad companies and street railroad companies, manufacturing and gas corporations, telephone companies, banks, and trust companies (440). These investigations were made for the State of Maryland, the United States circuit court, the chancery courts of Maryland, for stockholders, for creditors, and for underwriting syndicates (440), and required a critical examination of all books of account and of all vouchers for disbursements and everything connected with the financial operations of the corporations whose transactions he investigated (440).

In 1894 the legislature of Maryland appointed a telephone commission to make an examination of the affairs of the Chesapeake and Potomac Telephone Company, the purpose of the examination being to lay the basis for legislation reducing the rates charged by that company for telephone service in Maryland (46). This commission selected Tompkins to make the examination, which he accordingly made in 1895 (441). In 1897, in accordance with its habit to have its books occasionally carefully examined by an accountant outside of its own employés, the appellant requested Tompkins to make a second examination of its accounts, which he did (441). Finally, while Haskins was making his investigation for the six years from 1892 to 1897, inclusive, Tompkins was requested to and did make the same investigation for the same period (442).

The report of Tompkins to the telephone commission of Maryland in 1895, as well as his recommendations, were adopted by that commission as its own and submitted to the Maryland legislature. The report of the commission, embodying Tompkins' statement, will be found on pages 45 to 64 of the record. He found and reported that the average expense per subscriber of the Baltimore exchange of the appellant was $68.77 (55).

In making these investigations both Haskins and Tompkins personally inspected the entries in the appellant's books, and the vouchers and statements from which those entries were made (343, 441, 442). For the six years in question Tompkins' investigation was entirely independent of that made by Haskins (443–448). Yet, although each went through these multitudinous entries for himself and their calculations as to the expenses and receipts per subscriber were made entirely independent of each other, in the final result of the average of expenses and receipts per telephone per annum for this period they differed only about $0.02, which Tompkins thinks arose from the fact that he carried out his decimals to four figures and Haskins carried his out to only two figures (443).

The result of Haskins' examination for the six years in question, so confirmed by Tompkins, is manifested in the tables A, B, C, D, and E (1162 to 1167), showing for each year the receipts and disbursements of the appellant—the gross receipts and expenses for the whole period and the average receipts and expenses per annum. Exhibit D shows also the average number of exchange telephones in use during each of the six years, as well as the average for the whole period, which was 1,823.5. In the same exhibit the receipts and expenses relating to other than exchange business are deducted from the gross revenues and expenses, and the net exchange receipts and expenses thus arrived at. The results are (1166, 1167):

Average Exchange Receipts per Exchange Telephone.

1892.	1893.	1894.	1895.	1896.	1897.	Average per annum.
$94.11	$97.09	$97.27	$102.80	$94.94	$97.56	$97.26.

Average Exchange Expenses per Exchange Telephone.

1892.	1893.	1894.	1895.	1896.	1897.	Average per annum.
$57.02	$61.70	$67.57	$58.78	$61.26	$91.09	$66.57

Subsequently, and just before the taking of the testimony in this case was begun, Mr. Haskins made another similar investigation and report, and prepared additional statements for the period between January 1, 1898, and September 30, 1898 (344 to 349). As these statements are the most material evidence in the case, they are here reproduced in full.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, WASHINGTON PLANT.

Statement of Earnings for Nine Months Ended September 30, 1898.

Rentals from exchange subscriptions	$145,696.50	
Receipts from local pay stations	10,864.21	
Commissions on long-distance business	772.30	
Commissions on messages collected for the Western Union Telegraph Co	77.16	
Receipts from toll service	581.45	
Extraterritorial revenue	6,755.75	
Private-line rentals	4,912.10	
Messenger service	25.60	
Real estate	50.00	
Commissions on messages distributed for the Western Union Telegraph Company	21.38	
Loop rentals, care batteries, etc., for the American Telephone and Telegraph Company	814.37	
Moving telephones	560.81	
Profit on labor and material sold	1,171.27	
		$172,302.90

Statement of Expenses for Nine Months Ended September 30, 1898.

Maintenance:		
Salaries and wages	$31,590.29	
Rent, light, and heat	1,723.59	
Material	18,534.27	
Traveling	1,459.90	
Conduit, pole, and roof rental	274.25	
Insurance	227.50	
Damage and compensation	129.80	
Incidental	417.26	
Total maintenance expenses		$54,356.86
Operating:		
Salaries and wages	$11,631.35	
Rent, light, and heat	1,746.31	
Incidental	343.88	
Total operating expenses		13,721.54
General:		
Salaries and wages	$10,859.97	
Rent, light, and heat	673.64	
Real estate	203.72	
Traveling	1,617.64	
Postage, printing, and stationery	2,410.50	
Legal	3,914.73	
Incidental	2,024.53	
Total general expenses		21,704.73
Rental and royalties:		
Instrument rental, American Bell Telephone Company—exchange	$10,797.87	
Instrument rental, American Bell Telephone Company—private line	866.98	
Royalty on extraterritorial business	424.17	
Royalties on messages handled for the Western Union Telegraph Company	11.22	
Royalties on switch-board	1,385.77	
Total rentals and royalties		13,485.01
Total expenses		$103,268.14
59.93 per cent. of total gross earnings.		
Taxes		355.76
Total expenses and taxes		$103,623.90
Net earnings		68,679.00
Per cent. of expenses and taxes to total gross earnings		60.14

Statement of Income Account for Nine Months Ended September 30, 1898.

Receipts.

Net earnings, as per Exhibit "A"		$68,679.00
Disbursements.		
Bad accounts charged off	726.47	
Miscellaneous interest:		
Washington proportion figured on revenue basis	594.02	
Fixed charges:		
Interest on first-mortgage bonds, Washington proportion two-fifths of total charge	7,490.00	
Sinking fund:		
First-mortgage bonds, Washington proportion two-fifths of total charge	7,500.00	
		16,310.49
Surplus from operations		$52,368.51

Statement of Profit and Loss Account for Nine Months Ended September 30, 1898.

Receipts.

Surplus from operations, as per Exhibit "B"	$52,368.51	
Premium on one bond sold, $5—Washington proportion, two-fifths	2.00	
		$52,370.51
Charges.		
Dividend paid on capital stock:		
Three per cent. on $750,000		22,500.00
Surplus for nine months		$29,870.51

Statement of Earnings and Expenses per Telephone for Nine Months Ended September 30, 1898.

	Nine months' period.	*Average per annum.*
Average number of telephones in use	2,126	
Rentals from exchange subscriptions	$145,696.50	
Receipts from local pay stations	10,864.21	
Total exchange-station income	$156,560.71	
Private line rentals	4,912.10	
Extraterritorial and miscellaneous revenue	9,658.32	
Profit on labor and material sold	1,171.27	
Total receipts as per Exhibit "A"	$172,302.90	
Average per telephone	81.04	108.05
Expenses and taxes, as per Exhibit "A"	103,623.90	
Income account, expenses, as per Exhibit "B"	16,310.49	
Total expenses	119,934.39	
Average per telephone	56.41	75.21
Total net income from all business	52,368.51	
Average per telephone	24.63	32.84

Statement of Earnings and Expenses per Telephone for Nine Months Ending September 30, 1898.

Total receipts from exchange stations, as shown hereon	$156,360.71	
Average, per telephone	73.64	98.19
Total expenses, as shown hereon	119,934.39	
Less items not relating to exchange service—private line expenses, rentals, and royalties	917.80	
Royalty on extraterritorial business	424.17	
Royalty on messages handled for the Western Union Telegraph Co	11.22	
Proportion of expenses applicable to extrateritorrial and miscellaneous revenue (being the general percentage of expenses to earnings, not including rentals and royalties), 52.31 per cent. of $9,658.82	5,052.52	

Total deductions—expenses not applicable to exchange stations	$6,405.71	
Total expenses, exchange stations	113,528.68	
Average per telephone	53.40	71.20
Net earnings, exchange stations	43,032.03	
Average per telephone	20.24	26.99

It will be seen from these statements that the exchange expenses per exchange telephone averaged $66.57 per annum from 1892 to 1897, and were at the rate of $71.20 per annum during the first nine months of 1898.

It is stated in the opinion of the Court of Appeals that the court understood that we virtually conceded that interest on bonds and sinking fund outlays are not chargeable as expenses. We concede that the amounts set aside each year as a sinking fund for the retirement of bonds are no part of the ordinary expenses of the exchange, and we therefore exclude them from consideration. As to the interest on bonds, while it is obvious that payments on that account are no part of the ordinary expenses of the exchange, we did not in the Court of Appeals, and do not now, admit that they are to be thrown out of consideration in determining what are reasonable rates. We shall consider this question elsewhere.

We gave in our brief in the Court of Appeals (and now repeat in this court) the following statement of our position relative to interest on bonds and sinking-fund outlays:

"For the present purposes we shall assume that the amounts so paid on account of interest and sinking fund during the seven years in question should be deducted in arriving at the annual expense per telephone. For the time being we propose to deal with this question as though neither the capital stock nor the outstanding bonds of the defendant were to be taken into consideration at all, except in so far as they together may be represented by the actual value of

the defendant's plant on the day the act of Congress under consideration was approved."

Therefore, from the annual expense per telephone (including interest on bonds and sinking-fund outlays) we shall here deduct as follows:

Interest on bonds for nine months	$7,490.00
Sinking fund outlay for nine months	7,500.00
Total for nine months	$14,990.00
Add one-third (for remainder of year)	4,996.66
Total for year	$19,986.66

Dividing this amount by 2,126 (the average number of exchange telephones in use during 1898), we obtain $9.40 as the amount per telephone per year for the items in question; and deducting this from $71.20 to ascertain the average operating expense per exchange telephone for the year 1898, exclusive of interest on bonds and sinking-fund outlays, we find it to be $61.80.

The figures for the six preceding years corroborate those for 1898. The ordinary operating expenses, *exclusive of interest on bonds and sinking-fund outlays*, from 1892 to 1897 were as follows:

	1892.	1893.	1894.	1895.	1896.	1897.	Average per annum.
A.	$57.02	$61.70	$67.57	$58.78	$61.26	$91.09	$66.57
B.	4.57	8.78	8.80	9.18	8.51	8.31	8.04
C.	$52.45	$52.92	$58.77	$49.60	$52.75	$82.78	$58.53

A. Operating expenses, plus interest on bonds and sinking-fund outlays.
B. Interest on bonds, and sinking-fund outlays.
C. Operating expenses, exclusive of interest on bonds and sinking-fund outlays.

The significant amount is that representing only the ordinary operating expenses for 1898. It is $61.80.

No attempt was made to assail either the correctness of the books of account or the competency or accuracy of the accountants who examined them. On the contrary, assuming the statements of the accountants as to the financial results of the appellant's operations in the District from 1892 to 1897 and in the first nine months of 1898 to be correct, counsel for the appellees have sought from them to throw doubt on the reliability of the conclusions reached. In other words, they claim that certain items which may be proper as between the appellant and its stockholders must be left out of this account. We proceed to consider these items:

As to the contention that expenditures properly chargeable to construction have been charged to maintenance.

It appears from the testimony that in certain cases when part of the plant was abandoned and replaced by new construction, only so much of the cost of the new work as was in excess of the cost of the old was charged to construction (189, 190, 393). We do not understand that it is claimed on the other side that ordinarily this is not a proper rule; but it is insisted that when by the work of replacement the capacity of the plant is increased, some part of the cost of the new work should be charged to construction over and above the excess over the cost of the old work. Just what our opponents claim is the proper distribution of the cost of the new work under such circumstances between maintenance and construction they have nowhere told us.

While the rule is criticised generally, the objection is made mainly with reference to an item of $21,398.35, which was the cost of laying conduits in the year 1897 to take the place of certain underground construction previously used and referred to in the evidence as the "solid system." The cables so abandoned had been solidly em-

bedded in asphalt conduits laid under the street pavements. This was done in the years 1884, 1885, and 1886, in the early days of the exchange business (184).

As is well known, there was great opposition in Washington to increasing the number of overhead wires, and telegraph, telephone, and electric lighting wires were being forced underground as rapidly as possible. In compliance with this demand, the appellant, using the best methods then known, placed some of its wires under ground in V-shaped wooden conduits, without any other protection—some in boxes full of tar and others in asphalt (Crenshaw, 200). Experience taught that the latter method was subject to grave objections, its principal defect being that when a cable, or even a single wire in a cable, required repairs the street would have to be torn up in a number of places, first to locate the trouble and then to remedy it (184). In a few years, however, the "drawing in" system was invented, and it was found to be less expensive in the end to substitute that for a part of the solid system, so called, than to continue to use the latter, with all its drawbacks. In 1897 the sum of $21,398.35 was expended in replacing a part of the solid system, which was abandoned in the streets where it lay, and this sum was all charged to maintenance, and so helped to swell to unusual proportions the expenses of the exchange for 1897 (199).

The entire cost of the solid system was $114,236.15, of which $95,224.15 was for new work and the remainder was spent in endeavoring to improve it (200). Although it was all abandoned, only the $21,398.35 above referred to was charged to maintenance (199). Thus the sum of $73,825.80 was left to be charged in some way to profit and loss account, which indicates that the rule was not so applied as to unduly or unreasonably swell the expense accounts.

Haskins testifies, after his long and thorough examination of the books and vouchers of the appellant, that as a result of the departures which he found from the rule in

question between 1892 and 1897 there was charged to construction items that should have been charged to maintenance in the aggregate amount of $57,053.23 (354, 355).

On this subject Tompkins testifies that he made a very careful and critical examination of the books for the purpose of ascertaining "whether there had been any charges to plant which properly belonged to the expense account;" and says, "The maintenance charges, I think, were less than the actual outlay for maintenance" (443).

The undisputed testimony in this case is that the course pursued by the appellant, in the particular case objected to, in charging to construction only *the excess* of the cost of new work over old work which it replaced is the one generally followed by corporations, firms, or persons carrying on any business where a question as to what is the proper rule in such circumstances can arise. On his direct examination Haskins, being asked what are the proper entries in any manufacturing or business enterprise when a part of the plant is removed and new construction substituted, said:

"It is proper to charge the excess value of the new plant over that which it replaced to construction account, and charge maintenance or any reserve which they may have set up for replacements with the value of the old plant removed" (354).

As to the propriety and universality of this rule, Tompkins is even more explicit than Haskins. On cross-examination he stated that, without reference to increased capacity, he would charge to construction only the difference between the cost of the new plant and what had been the cost of the old plant which was taken out and destroyed (444). Upon being further pressed on this subject by cross-examining counsel, he said again emphatically that, without regard to increased capacity, he would not under any circumstances charge to construction a penny more than the difference between the cost of the old work and the new, and he added:

"It is not customary in corporations of any kind. * * * I will say here that that very question has come up before me with steam roads, electric roads, and all kinds of manufacturing plant, and in my own case as the manager of a large chemical manufacturing plant, I have invariably decided it that way" (445.)

And on redirect examination Tompkins said that this opinion was that of all public accountants with whom he had been associated (448).

Sclater, who had had supervision for nearly twenty years of the keeping of the books of the company having charge of all the telephone business in Canada, from New Brunswick to the Rocky mountains, was asked, on cross-examination, whether in the book-keeping of that company all reconstruction was not charged to maintenance, and he replied "No, only such portion of reconstruction as is not an increase. * * * We would only charge to construction the increase over the cost of what had been already charged to construction account" (1008).

There is not a word of evidence in the record to support the contention of counsel for the appellees on this point.

In *Southern Pacific R. R. Co. vs. Railroad Commissioners*, 78 Fed. Rep., 236, a case involving the validity of a California statute fixing maximum rates for transportation, it was urged, as here, that no part of money spent for betterments and improved machinery should be charged to maintenance. On this point (page 264) Mr. Justice McKenna said:

"The second ground of objection, that is, that to improvements and betterments, there will have to be considered—first, the abstract legality of such a charge; and, second, the competency of it under the leases. The abstract legality of such charge is established by the Reagan case (154 U. S., 362). The same contention was made there, and a deduction of the sum of $302,085.77 was claimed to have been charged to operating expenses, whereas it was expended for

'cost of road, equipment, and permanent improvements.' Mr. Justice Brewer, commenting on the claim, said:

"'Again, the sum of $302,085.77, appears in that table, under the description "cost of road, equipment, and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But, before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there was no extension of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails except as included within this amount. Now, it goes without saying that, in the operation of every road, there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "Renewals of rails and ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company.'

"Substantially to the same effect is *Union Pac. R'y Co. vs. U. S.*, 99 U. S., 402. In the latter case the court was called upon to interpret that clause of the act of 1862 in aid of the construction of the Union Pacific railroad, which provided that 'after said road is completed, and until said bonds and interest are paid, at least 5 per cent. of the net earnings of said roads shall also be applied to the payment thereof.' It may be said that there were several elements in that case which are not in the case at bar, but, nevertheless, the remarks Mr. Justice Bradley makes are substantially applicable."

The case of the *Union Pacific Railroad Company vs. The United States*, 99 U. S., 420, quoted in the above opinion, goes even further. In that case a question arose as to what credits the railroad company was to be allowed on account of expenses. It was being called to account under an act of Congress, which required that all sums over a certain amount of earnings should be paid over to the United States on account of a debt due from the company to the Government. Mr. Justice Bradley, in delivering the opinion of the court, said:

"Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earnings in order to arrive at the 'net earnings,' as this expression is to be understood within the meaning of the act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings, include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is

deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends, and the accumulation of a heavy indebtedness. The temptation is, to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But this is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock; but for making all ordinary improvements, as well as repairs, it is better for the stockholders and all those who are interested in the prosperity of the enterprise that a portion of the earnings should be employed."

In the case of *Metropolitan Trust Company vs. Railway Co.*, 19 Fed. Rep., 683–690, it appeared that the matter of fixing rates for railroad transportation had been left by the legislature of Texas to a railroad commission, and the question was whether the rates fixed by that commission were valid.

The court said:

"It seems to be contended that the case of the Houston & Texas Central Railroad Company fully justified the action of the commission in its imposition of a system of rates, because, as it is urged, it has made earnings over and above operating expenses sufficient to pay the interest on its outstanding bonds, and has a small surplus of a few thousand dollars in excess, as shown by its return to the commission of the operations of the year ending June 30, 1898—in other

words, it has paid interest on $34,000 of bonds to the mile. The return referred to is made on forms submitted by the commission, and under the item of 'Operating expenses' only ordinary repairs and replacements are allowed. *In case an insufficient wooden bridge is replaced by an adequate iron bridge, that is treated as a betterment and not permitted to figure in the returns as a part of the operating expenses. The bill and cross-bill show that if such betterments, which can only be made or procured out of the earnings of the road, were allowed in the return of operating expenses, the revenue earned and rendered as net revenue would not have been equal by several hundred thousand dollars to the interest on the bonded indebtedness;* that the bonded indebtedness outstanding against this road being in excess of the value fixed by the commission to the extent of more than 50 per cent., the company has no means of providing for such betterments if not at all allowed to charge them at any time against the gross earnings of the road. More than this, it is shown that the road has never at any time paid any dividends upon the stock.

"On the whole case, as made in the case of the Houston & Texas Central Railroad Company, it seems clear to me that the system of rates adopted and enforced by the commission does not afford to the owners of this property the equal protection of the law, and takes from the owners and stockholders the property they have therein, without just compensation, and that therefore the rates must be held to be unreasonably low, unjust, and confiscatory, and should not be submitted to and cannot be suffered to be enforced."

Mr. Justice Shepard, in his opinion in this case, holds that the cost of replacing the solid system of conduits should all have been charged to construction, saying that the rule "would be the same that seems to apply in the case of the "conversion of a horse railway into one operated by cable "or underground electric current or the erection of extra "tracks by steam railway companies" (1179, 1180).

The two illustrations seem to us to be totally dissimilar. One is the substitution of improved for old apparatus; the other is new construction. As to the latter we make no question. As to the former, we can only regret that the

opinion does not refer to the authorities which are supposed to support it. In the recent and thoroughly considered case of *Milwaukee Elevated R. R. Co. vs. Milwaukee*, 87 Fed. Rep., 577, the question of what allowance should be made for the expense of replacing horse railways by modern methods of street-car propulsion in determining what are reasonable rates for transporting passengers on the improved system was considered by Judge Seaman, and he held that there should be made an allowance of at least two million dollars for money spent in buying the old horse-car roads and in experimenting with new electric machinery.

And even if this item of $21,398.35 should be charged to construction and not to maintenance, it would amount to but $3,566.90 for each of the six years from 1892 to 1897, which is less than $2 per exchange telephone.

An objection of still less importance is to the manner in which the appellant has charged the expense attending installing instruments in a place of business or residence of a new subscriber. The transmitter and receiver of course do not enter into this matter at all, since they are merely leased by the appellant. The other parts of the instrument—the back-board, magneto bell, cords, etc.—are charged to construction, but the wiring of the new station and the labor of installing generally are charged to maintenance (278, 279). The reason for this is that the subscribers in a telephone exchange are constantly changing, old subscribers giving up their telephones and new subscribers taking their places, so that if the labor and wiring of these installations were charged to construction, that account in a series of years would be charged with many times the real cost of the stations in actual use.

Haskins states that the appellant's rule on this subject is the right one and gives the foregoing reasons (364). Ware, a leading witness for the appellees, testifies that precisely the same thing is done by the Citizens' Telephone Company at Grand Rapids, of which he is secretary, and of which

he was manager for several years (478–496). The testimony of Sclater, who has been for so many years in charge of the books of the Bell Telephone Company of Canada, seems to indicate that he follows the same rule, charging the instruments to construction when they are put up new, and charging the cost of labor and wiring to "revenue account" (1011). On the other hand, Holmes states that up to the time he testified, his company in Detroit charged every new installation to construction, but he adds, "What we would do when the plant is complete might be a different thing" (468, 469). He goes on to say that in the two years that his company has been in business about one thousand subscribers have dropped out. At this rate in a few years more there would be erroneously charged to construction an amount equal to the value of as many installations as he has subscribers. Again, when Holmes was asked whether the existing plant of his company in Detroit could be replaced for $500,000, he said he did not know, and then further remarked, "We have had to spend a good deal of money here putting in telephones that we have taken out" (551, 552).

The testimony in this case shows, as to the expense attending a new installation, excluding the value of the instruments themselves, that it ranges from two to six dollars per subscriber; and, since the increase in the number of subscribers of the Washington exchange from 1892 to 1898 was only 375 (from 1,751 to 2,126), this item would amount only to from 7 cents to 21 cents per telephone per annum during that period. In the first nine months of 1898 the increase in the number of exchange telephones was 14 (350). Even assuming $6 to be the cost of each installation, the total cost of these 14 was $84, which would amount to about *five cents* per subscriber per annum.

It must be admitted, therefore, that there is nothing substantial in the objections made to the manner in which the

appellant in its books of account distributed its expenditures as between construction and maintenance.

Royalties.

According to Haskins' statements, the average amount of the annual payments for "rentals and royalties" from 1892 to 1897 was $20,522.08 (1163). This, however, included an average amount paid for rentals and royalties during the same period on account of private lines, $2,121.77; on extraterritorial business, $662.83, and on Western Union messages, $36.57; a total of $2,821.17. The net annual telephone and switch-board rentals and royalties, therefore, during this period were $17,700.91. The corresponding statement for the first nine months of 1898 shows that the amount paid for telephone and switch-board rentals and royalties during that period was $12,183.64 (346). Adding one-third to get the proper amount for the year and the result is $16,244.85. During the six years in question the average per telephone—dividing $17,700.91 by 1,823.5, the average number of telephones—was $9.71. The average during the year 1898—dividing $16,244.85 by 2,126, the average number of telephones used during that period—was $7.64. In considering these items with a view to determining their reasonableness, that the payments are partly in the nature of *rentals* and partly in the nature of *royalties* should be taken into account. A considerable allowance must be made because of the fact that, as the instruments belong to the Bell Company, the appellant is not chargeable with keeping them in repair and sustains no injury from their depreciation. When they wear out or are replaced by more efficient instruments, the loss is that of the lessor and not that of the lessee.

In considering whether this is a proper item to be included in the expense account of the appellant, counsel for the appellees apparently take it for granted that the telephone

rental or royalty is paid merely for the use of the transmitters and receivere used in connection with the different telephones; but it is only necessary to read the contracts between the Bell Telephone Company and its predecessors and Maynard and his successors (19 to 40) to see that in fact the payment of so much per annum for each set of instruments is merely a measure of compensation for the exclusive right, first, to use the patents relating to telephone service which are, or which may at any time come under, the control of the Bell Company; and, second, for the right to have and use long-distance connections, enabling any subscriber in Washington having the long-distance equipment to communicate, without leaving his place of business or residence, with all the other telephone-users in the territory reached by the wires of the long-distance telephone company.

Included in this item of rentals and royalties is the sum of $1 per drop per annum paid to the Western Electric Company as a royalty for the use of the multiple switch-board. This amounted during the years 1892 to 1897 to an average of $1,642.53 (1163) per annum, and in the first nine months of 1898 to $1,385.77.

We are at a loss to know on what theory counsel contend that a telephone company should not be allowed to claim as a part of the proper expenses of its operation a reasonable compensation paid to the owners and holders of patents covering the apparatus which it uses in its business.

In the contract between the appellees and the appellant, a copy of which is filed with the answer (11), the appellees stipulated that the telephone and transmitter instruments were the property of the Bell Telephone Company, and were "constructed and used under its patents, and are leased and licensed by it only for the uses above stated, in consideration of a royalty and rental which it is to receive therefor, part of the payment named below, and which the Chesapeake and Potomac Telephone Company is author-

ized to collect for a period not exceeding one year in advance."

Boyce, one of the witnesses for the appellees, at the time he testified had applied for a patent on a switch-board of his own invention, which, he said, worked beautifully for two drops, and could be made to work for two drops or 2,000 drops, and he said that, while he had agreed with his own Grand Rapids Company that it might use this invention, everybody else would have to pay him something for using it—that he believed in monopolies to that extent (520).

The appellees' alleged expert witness, Dunbar, when he testified, had just been installing a new switch-board in St. Louis, which was the invention of one Kellogg. He said that the fundamental patents had been taken out by Kellogg in the early part of the nineties; that Kellogg had taken out about 125 patents at one time relating to telephone apparatus, and that he, Kellogg, had previously taken out a number of other patents on telephone apparatus (694). Dunbar further stated, what would hardly need any evidence to substantiate, that in the telephone business in general, where a change of design or an improvement either in construction or system is patentable, the inventor usually applies for such a patent (695).

From the testimony of Keelyn, another of the leading witnesses for the appellees, it appears that in contracts of his company with telephone companies, under which it sells to such companies switch-boards and telephonic apparatus, it requires the purchaser to agree not to contest the validity of any of the Western Telephone Construction Company's patents (731). Keelyn further testified that on April 21, 1896, the date of the contract between his company and the Fort Wayne Telephone Company, his (Keelyn's) company owned a certain patent, which was granted in 1894, for "a combined annunciator and spring-jack;" that his company for some years had been engaged in exploiting patents or devices covering different patents which

it owned or controlled or had license to use, and that there might be as many as one hundred patents controlled by his company (730–771).

In his contracts with his purchasers, Keelyn recognizes the existence of other patents on telephone apparatus, by agreeing, for his company, that if any parts of the apparatus sold by him should be adjudicated to be an infringement of letters patent of others his company would change the apparatus so that it would not continue to encroach on the patents of others (733).

Ahern, appellees' leading expert, was also an inventor. At the time he testified he held four different patents on telephone apparatus, all of which had been granted within a year, and had therefore at least sixteen years to run (855). These patents were for a switch-board, for a spring-jack, for a transmitter, and for a transmitter arm (856). He proceeded to say that he had applied for a patent for a switching apparatus, which, in his opinion, " is the best switch-board in the world today, barring none."

When this testimony is taken in connection with the evidence referred to on page 46 of this brief, showing the great changes going on in switch-boards and other apparatus used in connection with a telephone exchange, it cannot be disputed that in estimating the cost of operating any exchange using appropriate apparatus for the purpose of furnishing good service, there must be a very considerable allowance made for the recognition in one way or another of the rights of patentees. When it is considered further, what is not seriously disputed in this regard, that the equipment used by the appellees in this case, composed of the solid-back telephone, with complete copper-wire circuit, is today the most efficient telephone equipment in the world, and that through its instrumentality the appellees are connected, through multiple switch-boards, not only with the other subscribers in Washington, but with a vast number of exchanges scattered throughout the United States and Canada,

it would be remarkable, indeed, if, at this early day in the development of the telephone-exchange business, it should not be found that there were American inventors holding letters patent of the United States who were to receive some reward for the wonderful achievements of their brains and hands in producing such astonishing results.

Again, the appellant is bound by its contracts in evidence to pay the rentals which form the principal consideration for the privileges which it enjoys in this District under those contracts. If it should refuse to pay them, it would be no defense to a suit brought to recover them that this act of Congress makes it impossible to pay them and carry on its business.

The main consideration of the appellant's promise to pay the rentals is the right given it to use in this District many inventions protected by letters patent of the United States. May the United States say, You shall have no allowance for the payments which you have agreed to make upon such a consideration?

If the Bell Telephone Company should obtain tomorrow the control of patents which would enable a telephone exchange to be carried on without poles or wires or conduits, the appellant would be entitled under the contracts in question to demand the exclusive right to use such patents in this District, and so of every other patented improvement in the art. Is such a right, looking even only to the future, one for which it is unreasonable to pay something? Yet who can obligate himself to pay for it if he cannot include the payments among his legitimate expenses in fixing his own compensation?

Traveling Expenses.

This head of expenses in Haskins' statements is divided into two items, one under the head of maintenance, averaging $1,519.90 for the six years from 1892 to 1897, and for the

first nine months of 1898 amounting to $1,459.90 (345), and the other, under the head of general expenses, averaging for the six years in question $1,640.08, and amounting for the first nine months of 1898 to $1,617.64 (345).

There is in the record no direct testimony as to the details of these items. They are included, of course, in the general testimony of Haskins and Tompkins and the officers of the appellant company, that all the expenses shown upon the books were necessary and proper. The fact that no one of these witnesses was cross-examined as to these items, and that no explanation was asked for in regard to them, and that no call was made for any vouchers or the production of any entry in the books relating to this subject, estops the appellees' counsel from raising this objection after the evidence is closed, especially in view of the fact that they have themselves offered no evidence on the subject.

It is apparent enough how such expenses might be legitimately incurred. Crenshaw and his linemen and Crandall and his inspectors and instrumentmen are necessarily, in the performance of their duties, required to go from one end of the District to the other. The inspectors and linemen and instrumentmen would ordinarily go from point to point on the street cars, and each of the superintendents would be required frequently to use a horse and buggy to go around from place to place in the performance of his work. This would account for the small amounts allowed for traveling expenses under the head of maintenance.

As to the general expenses under this head, it is apparent that with a territory divided into several districts, as the territory of the appellant is divided, the traveling expenses of the general officers when absent from headquarters on the business of the company must be charged to a general account and each division must bear its fair proportion of the charge. The saving that results from having but a single set of officers for the whole territory more than compensates for this necessary traveling expense.

Occasionally, too, it was deemed expedient to send an officer or employé of the company to a city outside of its territory to investigate and report as to methods of construction and operation there preliminary to new work or to the introduction of improvements here (189).

All these items of traveling expenses amounted to $1.72 per telephone per annum in 1892–1897, and to $1.93 per annum in 1898, adding one-third to the amounts given for the first nine months of that year.

On the whole, the objections to these various items of expense, we submit, are without foundation and are unworthy of serious consideration.

2. *To the ordinary expenses included in the Huskins statements there must be added an allowance for depreciation and for extraordinary expenses caused by storms, fires, damage suits, and other contingencies.*

There is a great deal of evidence in the case bearing on the question of what is a proper allowance for depreciation. We proceed to consider some of it.

Perhaps the most satisfactory evidence upon this subject is that of McFarlane and Sclater as to the experience of the Toronto exchange from 1881 to 1895. McFarlane testified that the depreciation in the Canada exchanges generally amounts to 10 per cent. per annum on the entire value of the plant (963), and Sclater, as to the Toronto exchange in particular, testified that in 1895 the Toronto plant was worth a trifle over $684,232. He then produced and there was put in evidence a table showing the actual amount spent annually in Toronto for "construction" during a period of fifteen years. In this table there was deducted at the end of each year 10 per cent. on the aggregate of the value of the plant at the beginning of the year, and the amount spent for "construction" during that year. This calculation resulted in showing the value of the plant in 1895 to be a

trifle over $700,000, so that practically the theory agreed with the fact (1001–'2).

Curiously enough, Fleming, an ex-mayor of Toronto, had been previously examined at Detroit by counsel for the appellees, and had testified that the appraised value for taxation of the telephone plant at Toronto was about $600,000, and that this amount was reached by throwing off 15 per cent. from the actual value (535). Fifteen per cent. from $700,000 leaves approximately $600,000.

Maynard says that the old equipment which was in use when he was running the exchange in Washington has gone out of use entirely; that everywhere exchange apparatus is constantly being thrown away and being replaced by newer and better machinery, and that in his judgment the apparatus in use at present is no more permanent than its predecessors (414–416, 420).

In the estimate which he made as to the cost of running the Washington plant, Ahern, the principal expert on the other side in this case, allowed 5 per cent. on the value of the whole plant for "depreciation" (839).

Dunbar, the other principal expert for the appellees, in all the items of plant allows for "depreciation," although he mingles "maintenance" and "depreciation" in one item; so that the amount of neither in his estimate can be ascertained (679–680).

Crenshaw, than whom nobody is better qualified to judge, after a careful examination of the plants of certain independent companies, testified that, in his judgment, the Norfolk plant will last six years, the Richmond plant five to six years, the Grand Rapids plant about four and a half years, the Detroit plant five or six years, and the Fort Wayne plant about six years (1079).

So Keelyn admits that when making his estimate of the cost of running the Washington plant "there was some talk of a 5 per cent. amount for 'depreciation'" (778).

One of the most important, if not the principal, item

which must be taken into consideration in this regard is the expense of installing from time to time in every exchange a new switch-board. Yet all the testimony shows that this is an expense which every exchange must incur every few years.

Farnham testifies that the switch-board at Worcester, Massachusetts, has been changed four or five times; that more radical changes in switch-boards are coming on now than ever before; and that the newer boards are more expensive than ever (312, 313, 327).

Sargent testified that the switch-board in the principal exchange in Brooklyn, which was put in in 1888 or 1889, was about to be abandoned at the time he gave his testimony, which was in December, 1898 (431).

Boyce, a witness for our opponents, admits that in their Grand Rapids exchange they were constantly making changes in their switch-board. He says that the best switch-board is the "new relay No. 3," which, when he testified, had just been introduced, and that even that had been improved since it was used (519), and he informed us that he himself had applied for a patent on a new switch-board, which will be put in if he gets his patent (519). He also said that after a switch-board has been rewired a few times it becomes worthless (512, 530).

Dunbar, just before he testified, had been putting in a large, new switch-board for the independent company at St. Louis, and described the many novelties to be found in that board (691). Yet the Indianapolis switch-board, which he was then constructing, contained improvements on the St. Louis board (694). In short, Dunbar agrees with Farnham that radical changes are going on in the switch-board all the time (695).

Next comes Ahern, who informs us that he himself has invented the "best switch-board in the world, barring none" (856).

Berry, who was connected with the Bell Telephone Com-

pany at Grand Rapids, testified that the switch-board which was put in there in 1889 was about to be abandoned, and was to be replaced with a relay board, which, he says, is a new invention (1034, 1035).

Thorwald says that without doubt the Home Company's switch-board at Fort Wayne will have to be renewed or built over inside of ten years from the time the plant was built (1055).

Bethel says that at the time he testified the telephone company in New York city was reconstructing its plant and replacing all its switch-boards with relay boards (1140).

And Webb also says that in New York they have been adding a section of a divided board to some of their multiple boards pending the introduction of a new system, which will be a great improvement (1150).

Crandall tells of the frequent losses sustained in the Washington exchange on account of changes in the switch-board (237).

Very instructive on this subject is the testimony of Keelyn, the switch-board builder, who was called to testify against us. A few months before he testified he had installed a switch-board in Newark, N. J., which was quite a novelty with him. He asked counsel not to "bristle his hair" by asking him to describe the numerous improvements made in this board (674, 675). It would take him several days, if not weeks, to describe the novelties in that Newark board. After the Newark board had been constructed he had put up a switch-board at Norfolk, which was quite an improvement on the Newark board (737), and the Norfolk board, he admitted, had been changed by those who had the management of it (738).

Pannill, the Norfolk manager, describes the trouble with this Keelyn board and how it was remedied, adding that "the defects in it had been cured as far as possible in this board" (931–936).

And Keelyn said at the very time he was testifying they

were engaged in making changes in their switch-boards (740). We can understand now the significance of Keelyn's remark, when asked what kind of a switch-board was included in the estimate he had made for the construction of a telephone plant at Washington, when he said that the switch-board was "whatever it might have been engineered at the time" (768).

There is scattered through the record a mass of evidence as to the lifetime of other portions of a telephone plant.

Bryan testifies that the average life of the steel wire used in such plants is ten years (167); Crenshaw says that the average lifetime of the poles and cross-bars is ten years (187), and that the average life of the cables is from twelve to fifteen years (188).

Boyce admits that 8 per cent. is a fair allowance for depreciation on an overhead plant (529).

Pannill says that in Norfolk they were compelled to use juniper poles instead of chestnut, and that juniper poles would last nine years, provided they were stepped and spurs were not used on them (927).

McFarlane testified that in Toronto the poles and wires had become so thick that they could not be increased, and that they were therefore compelled to abandon them all and put the wires under ground (968).

In the development of the business in Montreal they had reached the same point (969).

Berry testified that the overhead plant of the Bell Company in Grand Rapids, after lasting 10 years, was about to be abandoned (1034, 1035), and further testified that the independent company at Grand Rapids was constructing underground conduits, which would result in the abandonment of the principal part of that company's overhead lines in the business part of the city (1038), and that that company, to raise the money for this work, had advertised an increase of its stock from $200,000 to $300,000 (1041).

One of the great enemies of the underground telephone

system is electrolysis. In a single year in Toronto $150,000 was spent to preserve the wires from this insidious enemy (102).

Bryan, Crenshaw, and Crandall tell of the troubles which they had in Washington from the same cause (150, 189, 196, and 246–249). Crenshaw says that for this disease there is no certain cure (195).

Beamer testifies that during the last year the underground plant of the Michigan Telephone Company in Detroit gave practically no service at all, because of electrical disturbances (1018).

In a report which was made to the State of Michigan by the independent company in Grand Rapids in July, 1897, it was stated that "10 per cent. discount should be made on poles, being annual depreciation;" also "annual depreciation on wire, probably 10 per cent." From one of the tables (954, 955) which accompanied that report we make the following extracts:

"Cross-arms, cost $1,950.00, depreciation $450.00.

"Batteries, depreciation $400.00, 66⅔ per cent. nearly worn out.

"Tools, $600.00, depreciation 33⅓ per cent."

It must be remembered in this connection that while this report is dated in July, 1897, this company had begun business only about a year before (478), and that all this depreciation occurred within that time.

In view of all this evidence, it is easy to understand the remark of Sclater, who had had experience as an accountant in many different kinds of business, when he says that the telephone business is the most difficult he has ever had any experience in, because every new subscriber is practically an increase to the "construction" account, and when you arrive at a certain stage you have to wipe it nearly all out and arrive at something else" (1003).

In this connection we refer again to a single experience of

the appellant company in the city of Washington: Between the years 1892 and 1897 the march of improvement compelled it to abandon 28,570 feet of conduit, referred to in the evidence as "the solid system," and about 126,000 feet of cable in those conduits, besides nearly 700 feet of aerial cable (67). The cost of the so-called "solid system," thus abandoned, all of which, in the first instance, was charged to construction, was $95,224.05 (200). We have seen that a part of this "solid system" was replaced in 1897 by conduit of the "drawing in" type, and that as a result maintenance account was charged with $21,398.85 (199). It is the difference between these two amounts, or $73,825.20, to which we call particular attention as having a most important bearing on this question of depreciation.

When portions of the plant became useless because of natural decay or improvement in methods, no charge was made to maintenance except for the *portion actually replaced* by new plant, and then the excess of the cost of the new over that of the old was charged to construction (190).

Manifestly, it is not only proper, but absolutely necessary, if failure is to be avoided, to provide a reserve or surplus, whatever it may be called, to meet such losses as the one referred to, and in a series of years the aggregate of such losses must necessarily become very large in any business, and particularly in that class which may well be called pioneer enterprises, to which this telephone business belongs in a pre-eminent degree.

In the case of *Milwaukee Elevated R. Co. vs. Milwaukee*, 87 Fed. Rep., 577, in which the validity of an ordinance fixing maximum fares for passengers on street cars was concerned, District Judge Seaman, in addition to the regular and ordinary expenses, allowed a large sum for depreciation.

In the opinion of the Court of Appeals it is said that no allowance should be made for depreciation, because replacements have been charged to maintenance and enter into

the average expense shown by Haskins' statements. This is true only as to the years 1892 to 1897, and then only to a very slight extent, as already shown. On the other hand, Haskins allowed nothing, in arriving at the ordinary operating expenses, for depreciation. There was "charged off" from the reserve on the books for that purpose, as representing a loss that was not made good in any way, three items of this kind for the years 1894, 1895, and 1896, amounting to $53,861.28 (355, 1165). *During the year 1898, which, after all, is the decisive period, no considerable betterments or replacements of any kind were made* (193), *and no allowance for depreciation enters into the average exchange expense for that year.*

In *San Diego Land Co. vs. National City*, 174 U. S., this court expressly holds that this item of depreciation must be taken into consideration in this class of cases. Mr. Justice Harlan, in delivering the opinion in that case, on page 757, says:

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of this plant, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same, the *annual depreciation of the plant from natural causes resulting from its use*, and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given to them, when rates are being fixed, as under all the circumstances will be just to the company and to the public."

So far we have dealt with depreciation proper—the loss from ordinary wear and tear and from apparatus becoming obsolete as invention improves the art. But there is another kind of loss not reducible to exact figures for which allowance must be made in every enter-

prise involving the use of a large physical plant—the loss from fire, flood, storm, and accidents of many kinds.

Ahern, the appellees' expert, after allowing 5 per cent. for depreciation, adds nearly as much more for "unexpected expenses" (839).

Holmes, the president of the "independent" company in Detroit, after an experience of less than two years in managing the exchange of that company, testified that the rate should be raised to take care of contingencies and unexpected expenses (472).

He tells, also, of a single storm which damaged the plant of his company to the extent of $10,000 (470).

Robertson, president of the Richmond Telephone Company, testified that a recent storm had damaged fully one-half of the telephones connected with the Richmond exchange (888).

Beamer testifies that in November, 1898, two entire lines of poles and wires of the Michigan Telephone Company in Detroit were destroyed, the poles, to use his expression, being "torn up by the roots" (1023).

A sleet storm in Washington in September, 1896, caused damage to the appellant's plant in this city to the extent of over $15,000 (150, 194). Even as this brief was preparing, another such storm did great damage to telegraph and telephone plants from New York to Baltimore, and even Washington did not wholly escape.

A recent fire in Paterson, New Jersey, utterly destroyed a central telephone exchange in that city, besides causing immense loss to other portions of the plant.

Any day, from a falling pole or a telephone wire coming in contact with one carrying a dangerous electric current an accident may occur which will result in an expensive lawsuit and may result in a judgment against the appellant for thousands of dollars.

This litigation is another example of extraordinary and unexpected expense.

In short, in the telephone-exchange business, as in all other business requiring the use of a plant which is destructible or capable of inflicting injury to others, an allowance must be made for many contingencies, all of which may happen and some of which are sure to occur.

Taking into account all these considerations of ordinary wear and tear and improvements in apparatus, as well as of extraordinary casualties, remembering that, as to the year 1898, neither the cost of replacements nor any amount carried to a reserve for depreciation has entered into the average expense made up from the books of account of the appellant, we submit that 7½ per cent. on the actual value of the material plant of the appellant cannot be said to be more than a fair and reasonable allowance for depreciation and contingencies.

3. *In addition to expenses, the appellant is entitled to a reasonable compensation. This involves an inquiry into the value of its Washington plant.*

It is important to get at the reasonable cost of a telephone-exchange plant to serve the public throughout this District for two reasons.

In the first place, the material part of an exchange plant, as we have just seen, is subject to depreciation and destruction in various ways, and we must get at the value of that part of the plant in order to arrive at a proper allowance for depreciation and contingencies.

In the second place, what is a reasonable compensation for rendering the service will largely depend upon the amount invested in the business, including the cost of the plant.

On page 383 of the record will be found Crenshaw's estimate of the cost of reproducing the outside plant of the exchage in Washington—that is, that portion of the plant

that lies between the walls of the exchange and the walls of the subscribers' stations. The total is $331,524.39.

On page 391 is Crandall's corresponding estimate for the inside portion of the plant—that is, the switch-board and other apparatus at the central exchange and the equipment of the subscribers' stations, excluding the telephones themselves, which are rented from the American Bell Telephone Company. Crandall's total is $96,475.40. The aggregate of the two estimates is $427,999.79. Neither Crenshaw (384) nor Crandall (391) includes anything but the aggregate of the value of the labor and materials that would necessarily be employed in the construction of the plant as it stood on the day the act of Congress in question was passed. With a reasonable allowance for the expense of the preparation of the plans for such a great work and for compensation of a superintending engineer, it is certainly fair to put the value of the whole plant at not less than $450,000. As the number of exchange telephones in use on July 1, 1898, was 2,135 (350), the value of the plant per telephone on that day was more than $210.

Crenshaw testifies that if the actual cost to the company of the outside work had been given, instead of its value on June 30, 1898, the aggregate amount of his estimate would have been increased 20 per cent. (384). Crandall testifies that the actual cost to the company of the inside plant was 20 to 40 per cent. more than his estimate (391).

And when, seven months later, Crenshaw was examined in rebuttal he testifies that in the interval which had elapsed the cost of copper wire had increased about 33⅓ per cent.; the cost of galvanized material used in cross-arms, braces, etc., 25 per cent.; the cost of aerial cables, 15 per cent., and the cost of poles and cross-arms, 10 per cent. (1082).

These estimates and the testimony of Crenshaw (185) show that in the Washington plant, at the time in question, there were 7,352 miles of wire, of which 1,457 miles were steel and iron and the rest copper. Of the copper wire all but 1,406

miles was in underground conduits. These conduits were 15.1 miles in length, and contained 132 duct miles (191).

The average distance of the subscribers' stations from the exchange was 1.9 miles (1069).

The amount actually expended in constructing the Washington plant from 1881 to December 31, 1897, was $532,556.76 (369).

None of this evidence has been met directly. The appellees have contented themselves with introducing the opinions of certain alleged experts as to what it would cost to equip in Washington a telephone exchange. These experts and their testimony, therefore, next demand our attention.

And first is Keelyn, the president of a Chicago corporation engaged in the business of making and selling switch-boards and telephones. As he was also examined at great length upon other subjects supposed by the appellees to be quite material in the case, it is worth while to give some consideration to the question of his credibility generally and to the weight to be given to his opinions, assuming them to be honestly given.

Keelyn is not certain whether the telephone plant, the cost of which he was to estimate, was to be used only in the city of Washington or to extend throughout the District. He does not know whether Georgetown or the Navy Yard is within the city limits (761). He does know that Chevy Chase is up along the Potomac river (761). He is, apparently, not certain whether Georgetown is in the same direction as the White House from the corner of F and Fourteenth streets.

Although in his examination-in-chief Keelyn had been examined at length as to the dealings of his company with the Home Telephone Company at Fort Wayne, he refused to exhibit the contract between that company and his own company, and insisted on stating the contents thereof (645–647). Appellees' counsel suggested to the witness that he

was under no obligation to produce that contract (646). For a long time Keelyn refused to produce the books of his company for the purpose of having its account with the Fort Wayne Company examined. When he did produce his ledger and the Fort Wayne account was under examination, it appeared that some of the entries contained the letter "J." When he said he did not know what this letter meant, he was requested to ask his book-keepers and let counsel know what was represented by it. Thereupon appellees' counsel advised the witness that he was under no obligation to inform himself on the subject, and he accordingly declined to do so (651). Referring again to the Fort Wayne contract, Keelyn said that he did not understand that he had declined to attempt to find it; that he had declined to submit it (658, 659).

He was examined in chief as to the new switch-board which he installed at Newark, New Jersey. He refused on cross-examination to state whether that board was equipped with a certain device (671). He had testified on his examination-in-chief that his company had furnished telephone apparatus in certain towns which he mentioned. When he was asked on cross-examination as to each of those towns to state when the last of such sales was made, as to most of them he refused to answer. As to a few of them he did answer. Being asked why he answered as to one town and not as to another, he replied, "I chose to answer in the case of Johnstown as I answered it, and I chose to answer it in the other case as I answered it" (740, 741, 742, 743). Being asked some question as to still another town, counsel for the appellees requested the witness to answer if he could. Thereupon counsel for the appellant asked counsel for the appellees why he interfered then, when a few moments before he had refused to interfere, and appellees' counsel replied, "To which there is no response" (743). The witness then said it would take some time to acquaint himself with the facts to enable him to answer the questions about these

towns. Being requested to so acquaint himself by counsel for the appellant, appellees' counsel volunteered to give the witness the advice that he was under no obligation to make the search. Thereupon the witness declined to make the search and refused to produce the books showing the accounts of his company with the companies in those towns so as to let the information be obtained in that way (744).

At this stage of his examination Keelyn admitted that he might have assumed when he gave his testimony-in-chief that he would be subjected to cross-examination, and went on to make a statement that plainly indicated that up to that time the counsel upon whom he had relied for advice as to whether or not he should answer certain questions was one of the counsel for the appellee (745, 746). The same question being then asked as to Charleston, South Carolina, Keelyn replied that his company had furnished telephone apparatus to the Charleston company possibly within a month, and, being again asked why he answered as to Charleston when he had refused as to so many other towns, he replied, "A matter of notion, possibly, more than anything else" (746). Being then asked if his company had recently made any changes in the apparatus which it had furnished to a telephone company in Lansing, Michigan, and, if so, how recently, he replied that the date would appear upon his ledger, but that he would not produce the ledger nor look at it himself and give the date (747). He said that his estimates as to the cost of a Washington plant had been made in connection with some other persons, and he refused to give their names.

When Keelyn was asked to specify the differences between the plant for Washington covered by his estimate and the existing plant here, counsel for the appellees objected on the ground that the witness had not so informed himself as to the existing plant as to enable him to answer the question (767).

Finally, and sufficient of itself to dispose of Keelyn, when

he was asked on cross-examination to give the details of his estimate, so that the court could see how it was made up, he refused to do so, and said the court must take his estimate in the lump or not take it at all (778).

And when we get this expert's estimate it is simply that the cost of the proposed plant in Washington was "less than $450,000.00" (626). This estimate was for a plant for 3,000 subscribers, with an excess of cable capacity for only 1,000 and an excess of conduit capacity for only 2,000 (625). It will be manifest, we think, that when we come to consider the facts as to the conduit and cable capacity, that there should be added to Keelyn's estimate a very large percentage to avoid the danger, which would otherwise be imminent, of having in a few years to lay an entirely new system of conduits in the territory covered by the existing conduits. But, however that may be, his estimate does not differ materially from the value of the appellant's plant in the District, as shown by the carefully itemized statements of Crenshaw and Crandall.

The next estimate is that of Dunbar. That he had no such experience as to qualify him to testify upon this subject as an expert clearly appears by his own statement of his employment from the time his business career began, in 1890, until he gave his testimony, in January, 1899 (688). He never inspected the Washington plant (687); he has no idea how many square miles are embraced in the city of Washington, and does not know the area of the District (697). The knowledge of the situation in Washington upon which he solely relied in making his estimate was obtained from an inspection of Exhibits "L" and "M," being the aforesaid estimates of Crenshaw and Crandall respectively (697). He did not know whether any subscriber of the Washington exchange was located out of the city of Washington proper or not (697). He has no idea what proportion of the area of the city of Washington is occupied by streets, avenues, and public places (712). He does not even know that George-

town is a part of Washington (712). He thinks the business section of Washington is concentrated between Seventh and Fourteenth streets (712). He is quite sure that the *average distance* of the subscribers from the central exchange in Washington *does not exceed .83 of a mile, and he has made his estimate on that basis* (718, 719). The astonishing result of this utter misunderstanding on Dunbar's part of conditions in Washington is shown by the fact that he allows $25,000 for the total cost of construction of all the conduits (680), whereas the mere cost to the appellant of the one item of relaying the asphalt pavements after constructing its conduits was $35,000 (1068). He allows 140 poles to the mile (722), which would put them about 37 feet apart, whereas the standard distance between telegraph and telephone poles everywhere is 150 feet (1066, 1067), thus showing incompetency or carelessness in making his estimate. He allows only 25 or 30 manholes, which would put them 2,400 feet apart, whereas the usual distance is from 300 to 350 feet (1070). It requires no expert to satisfy us of the impossibility of handling cables in conduits with manholes nearly one-half a mile apart. For the manholes themselves he allows an average of about $90 (721), whereas the actual average cost is $143 (1070). He allows nearly twice as much for the cost of the cables as for the conduits (680), whereas in fact the conduits cost nearly three times as much as the cables (1071).

But even Dunbar practically corroborates the evidence of Crenshaw and Crandall as to the value of the Washington plant. He states in so many words that he thinks their estimates fair, except that he thinks Crenshaw has allowed an excessive amount of conduit capacity, and that Crandall has allowed too much for the average cost of the equipment of the subscribers' stations. As to the principal of these two items—the cost of the conduits—it is apparent that the mistake is his, because he assumes that the average distance of the subscribers from the exchange in Washington is only .83 of

a mile (718), whereas it is in fact about 2½ times that distance (1069). This mistake of itself renders his estimate of the cost of the plant in Washington unworthy of consideration. But we find that, in addition to this gross error, his allowance for conduits is based upon the proposition that at regular periods of from two to five years, as the exchange grows, the streets shall be torn up and the expense incurred of laying new conduits (716).

The conduits of the Washington plant as at present constructed, with every duct filled and every wire in use, would accommodate only 5,600 subscribers (1084). Manifestly, as Crenshaw testifies, this is a condition that is impracticable, for there must always be many cables the wires of which will not be used to their full capacity; and even if theoretically that stage should be reached, then to accommodate the next hundred subscribers it would be necessary to lay an entirely new system of conduits.

Clearly the exercise of good judgment is required in determining, in laying a conduit, what its size should be. This requires not only information as to the probable number of telephone stations along the line of the conduit, but a calculation as to the expected growth of the city in that direction; and for once Dunbar was frank enough to admit that what would be reasonable provision for future growth would depend upon local conditions, of which he had no knowledge (717).

As to the equipment of subscribers' stations, Dunbar in his estimate allows for 2,200 subscribers' sets at $16 per set, an aggregate of $35,200, and $4 per subscriber, or $8,800, for the cost of connecting the subscribers' stations with the "cable heads or housetop terminals" (679). In this estimate he includes the transmitters and receivers as well as the other parts which go to make up a subscriber's set.

Crandall's estimate (391) of the cost of duplicating the existing plant contains two items for the cost of subscribers' station equipment, one for reproducing the metallic circuits

and the other the grounded circuits. These two amounts are $16,839.69 and $19,387.28, an aggregate of $36,226.97 (391)—that is, $7,773.03 less than Dunbar's estimate of $44,000. If to Crandall's estimate were to be added the cost of the telephones his estimate would exceed that of Dunbar, but the difference would be slight. Therefore the only substantial difference between the estimate of Dunbar, on the one hand, and of Crenshaw and Crandall, on the other, so far as the value of the plant is concerned, is that which grows out of Dunbar's mistake as to the extent of the territory supplied with telephone service by the Washington exchange and his failure to provide for the growth of the exchange for a reasonable time in the future.

Dunbar at first gave the impression that he had given a week or ten days' study to the Washington situation (697, 698), but, upon the matter being examined into closely on cross-examination, it appeared that he had no information bearing upon the question of the cost of reproducing a plant in Washington until the day before he gave his testimony. He tells in detail the number of hours which he gave to the study of this matter (698). Enough has been stated to show the worthlessness of his opinions as an expert, but his entire deposition should be read to appreciate the straits to which the appellees were reduced in trying to meet the case made by the appellant.

The next estimate is that of Ahern. He had a number of years' experience as superintendent of the maintenance department of the telephone company in Chicago—one of the largest in the country—and superintended the construction of the independent company's plant in Detroit and in numerous smaller towns in Michigan. At the time he testified he was engaged in constructing a similar plant in the city of New Orleans. If this witness had been brought to Washington and had made a careful examination of the situation here, so as to be informed of the kind and extent of a telephone plant required to furnish service to the entire District,

he might, if disposed to be fair, have given very valuable evidence in this case; but, instead of pursuing this course, he was simply asked to state from his experience what would be a fair sum to be allowed for the construction of a plant for 2,200 subscribers in Washington, and when he replied that $125 per telephone would be a fair valuation the subject was dropped so far as the examination-in-chief was concerned (838, 839).

On cross-examination he was asked to give the details of the plant for 2,000 subscribers which he proposed to construct in Washington (842). The witness thereupon, in the space of fifteen minutes, disposed of this question and the detailed estimate, which was the result of his labor, was put in evidence (842, 843). It begins by the allowance of $60,000 for a switch-board with a capacity of 3,000 drops, which is nearly twice as much as Crandall's estimate for the same item (391). He allows for 250,000 duct feet of conduit, or about 47 miles, when the real quantity actually constructed and required is 132 miles (383, 185). He allows for 2,000 miles of wire, and, as his calculation is based upon a metallic circuit, this amounts to 1,000 miles in actual length. As he has 2,000 subscribers, this puts them at an *average distance of one-half a mile* from the exchange, or a little more than one-fourth of the real average distance. The number of miles of wire in actual use in Washington at the end of 1897 was 7,352.5 miles (383). Yet, while Ahern assumed that the area to be covered by a telephone plant would make some difference in the cost of the plant, he added with great complacency that he had been very liberal in the amount of wire (844).

He is under the impression that Georgetown is on the Virginia side of the Potomac river (844). All he knows about Georgetown is what he has read about it in history (844). He apparently never heard of Anacostia, Takoma, Chevy Chase, or the other small towns which are within the territory served by the Washington exchange (844). He does

not know of any place in the United States where asphalt pavement has been torn up for the purpose of laying telephone conduits (846)!

He thinks 80 manholes sufficient, and that the average cost would be about $40 (848), whereas there are over 200 manholes and their average cost is $143 (383, 1070). The average height of the poles included in his estimate is 40 feet (849). As a rule, he says, pole lines are cheap affairs anyhow (844). He has never heard of a regulation which would oppose the setting of fifty-foot poles 6 feet in the ground (850). But in the city of Washington pole lines are very expensive affairs. There must be a clear space of 50 feet between the wires and the ground, thus requiring the use of poles at least 60 feet long (1072).

The one plant, with the construction of which this witness was familiar, which at all approached in size that of Washington was the Detroit telephone plant, in which the average distance of the subscribers was not more than three-fourths of a mile (557). This witness thought that plant cost about $600,000, and that the books would show. When asked whether the secretary of the company would show the books he remarked, "I think he would be a big chump if he did" (841).

The evidence of the appellees' experts as to the cost of an exchange plant in this District confirms in a striking manner the estimates of Crenshaw and Crandall. Those experts had in mind a plant corresponding in extent and in construction to those with which they were acquainted in cities of about the same population as Washington. Making allowance for the fact that such a plant for Washington city must spread over several times the space which would be occupied by the plant of an exchange in Detroit or any other city of the same class, for the fact that the exchange here must serve, not the city of Washington only, but the entire District of Columbia, and for the fact that our asphalt pavements and the regulations in force as to the height

of poles add greatly to the cost of a plant here, the estimates of the appellees' experts show that those of Crenshaw and Crandall are very moderate. We feel justified in assuming, therefore, that the value of the tangible property embraced in the exchange plant in this District upon which depreciation is to be estimated, and upon which interest is to be computed in deciding what are reasonable rates, is not less than $450,000.

But, in addition to the value of the materials in the plant, a fair allowance must be made on account of the plant being in use as a "going concern."

The argument upon this point has been so well stated by Mr. Justice Brewer in delivering the opinion of himself and of Circuit Judge Sanborn and District Judge Thayer, in the case of *The National Water Works Company vs. Kansas City*, 62 Fed. Rep., 865, that we do not presume to add to the force of what is there said. In that case the municipality had determined to take the plant of the water works company which furnished the city with water and to run the water works itself. The question was what was the value of the water-works plant; and in considering whether, in fixing that value, anything but the naked value of the labor and materials involved in constructing the plant was to be taken into account, Mr. Justice Brewer said:

"The difficult question, however, still remains, and that is, what is 'the fair and equitable value' which by the statutes and ordinance the city is to pay for the water works? This amount was found by the circuit court to be $2,714,000. The company insists that the test is to take the income or earnings and capitalize them. The earnings pay 6 per cent. on four millions and a half. In other words, the company has produced a property which earns six per cent. on four millions and a half, and that, it is claimed, is the fair valuation of the property, six per cent. being ordinary interest. On the other hand, the city insists that the fran-

chise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate to go into a water-works system as a complete structure, irrespective of everything else—irrespective of anything which the property earns or may earn in the future. We are not satisfied that either method by itself will show that which under all the circumstances can be adjudged 'the fair and equitable value.' Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the water works. The original cost of the construction cannot control for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the water-works plant be a fair test, because that does not take into account the value which flows from the established connections between the pipe and the buildings of the city.

"It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A complete system of water works such as the company have, without a single connection between the pipes in the street and the buildings in the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings of the city—not only with a capacity to earn, but actually earning—makes it true that the 'fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own connections between the pipes and the streets and the buildings—such connections being the property of the individual property-owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for a water-works system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and growing business. The additional value created by the fact of many connections with buildings with actual supply and actual earnings is not represented by the

mere cost of making such connections. Such connections are not compulsory, but depend on the will of the property-owners, and are secured only by efforts on the part of the owners of the water works, and inducements held out therefor. The city by this purchase stepped into possession of a water-works plant—not merely a plant for bringing water to the city and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It stepped into the possession of a property which not only has the ability to earn, but is in fact earning. It should pay, therefore, not merely the value of a system which might be made to pay, but that of a system which does earn."

There must be added also the value of the appellant's contract privileges and other incorporeal property in the District.

When the appellant company was organized, in 1883, and its stock distributed, $750,000 of the stock was apportioned to the District of Columbia plant. The consideration of this stock was made up of $77,334.93 in net cash assets received from the National Capital Telephone Company, of which it was the successor; $91,130.21, the value of the plant turned over to the appellant, and $581,534.86, the estimated value of the "franchises, licenses, rights of way, etc.," turned over to it by the National Capital Telephone Company (371).

We are not particularly concerned with the value of the incorporeal property of this company in 1883, but manifestly the company could not have transacted a telephone business in the District of Columbia without first purchasing on the best obtainable terms the rights and privileges possessed by its predecessor. The fundamental telephone patents were then all alive.

But between the 1st of August, 1883, and the 31st of December, 1897, the amount representing franchises, licenses, rights of way, good will, etc., was reduced by $273,072.01,

leaving on December 31, 1897, on that account $308,462.85 (370).

The word "franchise" in this connection refers to the rights of the defendant company under the various contracts between it and its several predecessors, on the one hand, and the American Bell Telephone Company and its predecessors on the other (19 to 43). They include the exclusive right to use in the District *any patents which may at any time come under the control of the Bell Telephone Company* and *the exclusive right of connection with the system of the long-distance company* (420, 421).

We shall not refer in detail to the various rights of way without which the business could not be transacted, good will, etc., but we believe that, fairly considered, the amount standing on the books of the company at the date named will be looked upon as reasonable and just.

It is submitted, therefore, that in determining the value of the exchange plant of the company in this District there must be added to the mere cost of reproducing the physical property a sum fairly representing the value of the incorporeal rights which it has acquired from the Bell Company and its predecessors, its various rights of way, good will, and the value attaching to it as a "going concern." When this is done it certainly cannot be said that the aggregate value on June 30, 1898, was less than $750,000.

In the Haskins statement certain items show that 40 per cent. of the interest on mortgage bonds paid each year was treated as a fixed charge upon the company's operations in the District of Columbia. The mortgage referred to covered the entire property of the company and authorized an issue of bonds to the amount of $600,000 (42). Of these bonds $400,000 were issued prior to 1892 (367) and $100,000 on December 23, 1897 (150, 367, 370). It has been suggested

that the proceeds of the bonds were not used in constructing the Washington plant.

The Haskins statements show that the earnings of the company exceeded the ordinary operating expenses, fixed charges, and dividends paid during each of the years under consideration, and that during the period from August 1, 1883, to December 31, 1897, there was spent on construction account for extensions to the plant in the District of Columbia the sum of $441,426.50. To meet these construction outlays, 40 per cent. of the proceeds of the bonds was apportioned to the District (71). The fairness of this apportionment has been questioned because all proceeds of bonds went into the general treasury (367). Haskins testifies that when he made up the original statement he found that the proportion of the total construction cost was about two-fifths for the District of Columbia (367). During the seven years under consideration, the Washington exchange had 40 per cent. of the subscribers and earned more than 40 per cent. of the company's revenues. Hence, in apportioning the bonded debt, it seems just to have charged to the District 40 per cent. of the total. However, the plant in the District is covered by the mortgage, and the bondholders have rights which should be considered. Obviously the payments of interest on bonds are not a part of the ordinary operating expenses of the exchange, and for that reason we have specifically excluded them above.

We did not in the Court of Appeals admit, however, that they are to be thrown out of consideration in determining what are reasonable rates. On the contrary, we gave in our brief in that court (and now repeat in this court) the following statement of our position on that point:

"THE RIGHTS OF THE BONDHOLDERS.

"So far we have considered this question as though the only parties interested are the public, on one side, and the stockholders of the defendant company, on the other; but

in fact, those having the most direct and immediate interest are the bondholders. They have the first lien on the property of the defendant. If it is ruined, their security is gone. The bonds have been on the market for several years, and in the ordinary course of business have gone into the hands of many investors. Yet, though their rights are paramount, they have never been heard—have never had an opportunity to be heard.

"In *Smyth vs. Ames*, 169 U. S., 574, this court said:

"'We hold that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvement, *the amount and market value of the bonds and stock*, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required for the operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.'

"In *Chicago, &c., R. Co. vs. Dey*, 35 Fed. Rep., 866, 879, Mr. Justice Brewer, in delivering the opinion of the circuit court of the United States for the southern district of Iowa, used this significant language:

"'The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholder's property because the railroad is mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagor's

rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholder's property may be reduced, in that less dividends are possible, and that power of the legislature over property is conceded, yet, if the rates are so reduced that no dividends are possible, *and especially if they are such that the interest on the mortgage debt is not earned*, then the enforcement of the rates means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons without reward.'"

RESULTS.

We are prepared now to ascertain the result of the foregoing principles and facts as applied to the determination of the question whether the maximum rates fixed by the act of June 30, 1898, are unreasonably low.

As to the year 1898, the showing is as follows:

Average expense per exchange telephone (exclusive of interest on bonds and sinking-fund outlays, as shown)	$61.80
Depreciation and contingencies, at 7½ per cent. per annum, on value of plant, $450,000, divided by 2,126, the average number of exchange telephones in 1898	15.87
Compensation of 6 per cent. per annum on $750,000 (the value of the plant as a going concern, including franchises, licenses, rights of way, good will, etc.), divided by 2,126, the average number of exchange telephones in 1898	21.17
Total	$98.84

To meet which we have maximum rates fixed by the statute, varying only with the number of telephones on a wire, and ranging from $25 to $50 per year. In view of this, it would seem to be impossible to seriously contend that the act should stand.

To further illustrate the inadequacy of the rates fixed in the act, we append two additional tables, one for the year 1898, and, as corroborating it, one for the six years from 1892 to 1897, showing the result when *nothing is allowed for*

depreciation, contingencies, rentals, royalties, traveling expenses, interest, or sinking fund, and throwing out all consideration of the added value of the plant from its being a going concern, and all allowances for franchises, licenses, rights of way, good will, etc.

As to the year 1898:

Haskins' average for the year (including interest on bonds and sinking-fund outlays)		$71.20
Add for compensation 6 per cent. per annum on the value of material part of plant, $450,000, and divide by 2,126, the average number of exchange telephones		12.70
		$83.90
Deduct:		
1. Sinking fund	$7,500.00	
2. Interest	7,490.00	
3. Royalties not already deducted by Haskins (346), $10,797.87 plus $1,385.77	12,183.64	
4. Traveling expenses	1,459.90 1,617.64	
	$30,251.18	
Add one third for the remainder of the year and divide by 2,126, the average number of exchange telephones in use in 1898		18.97
Balance		$64.93

As to the years 1892 to 1897:

Haskins' average for these years (including interest on bonds and sinking fund outlays)		$66.57
Add for compensation 6 per cent. on $400,000, divided by 1,823.5, the average number of exchange telephones		13.16
		$79.73
Deduct:		
1. Sinking fund	$6,666.67	
2. Interest	8,004.55	
3. Rentals and royalties not already deducted by Haskins, $16,058.38 plus $1,642.53	17,700.91	
4. Traveling expenses	1,519.90 1,640.08	
	$35,532.11	
Divide this sum by 1,823.5, the average number of exchange telephones		19.54
Balance		$60.19

Thus, with controverted items omitted, and with no allowances for depreciation or contingencies, the statutory rates are shown to be far from adequate, not only for 1898, but also for the previous years.

A striking illustration of the fairness of the allowances for depreciation, contingencies, and compensation in the foregoing calculations is to be found in the interstate commerce table on page 84 of the record.

As to 1898, the percentage of telephone operating expenses to operating earnings required, as above set forth, is 62.42 per cent., as shown by the following:

$$98.84 : 61.80 : : 100 : 62.42$$

The interstate commerce table referred to shows that the various railroads of the United States during the seven years from 1890 to 1896 were operated at a percentage of operating expenses to operating income of from 60.80 to 78.42 per cent. For the entire country the percentages varied in the different years from 65.80 to 68.14.

Yet it is well known that, in an established enterprise like that of railroading, depreciation due to changes in methods is not nearly so great as in a pioneer enterprise like that of telephony, and it is also well known—indeed, at the hearing below it was asserted by one of the counsel for appellees—that the period in question was one of great depression in the railroad business in this country, and that the railroad companies, as a rule, were on the verge of bankruptcy.

Opinions of alleged experts introduced by the appellees as to the probable expense of operating a telephone-exchange plant in Washington.

We have already seen that on the question of the cost of a telephone plant requisite for the needs of the District of Columbia the appellees offered no direct evidence whatever. They pursued precisely the same course upon the

question of the expenses attending the operation of such an exchange. They informed the court below, and they will no doubt make the same admission here, that they do not dispute either that the books of the appellant were properly kept or that the system of book-keeping was a proper one, and they do not deny that the statements made up from the books by Haskins and confirmed by Tompkins make a full and true showing of the receipts and disbursements of the appellant from the 1st day of January, 1892, to the 30th day of September, 1898.

It would have been easy for the appellees to bring to Washington men familiar with the operation of telephone exchanges, to have shown them where the conduits are buried and where the pole lines run, and to have acquainted them, not only with the plans of the city of Washington, but with the location of the suburbs and of the District line. They could have exhibited to such experts the lists of the officers and employés of the appellant company in this case (72 to 80). They could have asked these men to point out, if they could, an officer or employé whose services could be dispensed with or whose compensation might in fairness be reduced. But the appellees did none of these things. They undertook to meet the great mass of evidence which the appellant introduced, showing that the rates fixed by the statute will fall short of the necessary expense of operating a telephone exchange plant in the District by having Keelyn, Dunbar and Ahern sit down in Chicago or Detroit and with a pencil, in a few moments, tell the court what they thought they could operate an exchange for in Washington. Their entire ignorance of the conditions necessary to form an opinion on this subject which would be entitled to any weight is shown in this brief elsewhere. And neither Keelyn nor Dunbar ever operated a telephone exchange anywhere, except that Dunbar for two or three weeks undertook to fill the place of the manager of an ex-

change in a New England town having from 75 to 100 subscribers (692).

A curious side light is thrown on Ahern's testimony on this subject by putting together his statements as to the Chicago plant. He was the chief of maintenance of the Chicago Telephone Company from 1879 until 1892. That company then had about 10,000 subscribers (837). Ahern, as chief of maintenance, had 250 men in his employ, or about one for every forty subscribers. At this rate Washington would require 55 linemen, a larger number than actually appeared on the rolls. Ahern also testifies with some pride to the accuracy with which he was in the habit of estimating for the Chicago Telephone Company its probable expense for maintenance for each ensuing month. He says that his last monthly estimate for Chicago was $39,000, and that this turned out to be almost exactly correct (850, 851). This would be $468,000 per annum, or, based on the number of telephones then in use, nearly $47 per telephone per annum for maintenance alone.

We invite attention to the cross-examination of Dunbar, on pages 702, 704, 706, and 707, as showing, first, his absolute ignorance as to the cost of operating a telephone exchange in any large city, and, second, his determination to keep the court from becoming aware of that ignorance.

These witnesses have entirely overlooked the difference between Washington and other cities affecting the cost of operating a telephone exchange, a subject to which we shall next direct our attention.

AS TO THE EVIDENCE RELATING TO TELEPHONE SERVICE AND RATES IN OTHER CITIES.

Avoiding the District of Columbia and the conditions under which telephone service must be rendered here, the appellees' counsel proceeded to journey from city to city, starting at Detroit and winding up at Norfolk,

taking testimony about telephone rates and plants in other cities. All this evidence came in subject to objection (170, 450). Counsel seem to take it for granted in their brief that when it has been shown that in some other place some telephone company is doing business and charging rates less than those fixed by this act of Congress the presumption arises without evidence that these companies are doing business at a profit, and that the burden is cast upon the appellant to show that the conditions under which such companies render service are so different from the conditions under which the business must be carried on in the District of Columbia that rates which will pay in those cities will not pay here.

On this point we do not agree with our opponents. After evidence so full and satisfactory, showing that in the District of Columbia efficient telephone service cannot be rendered at anything like the rates fixed by the statute, has been placed before the court by the appellant, it certainly cannot be that that evidence is met or its weight affected by simply showing that in certain cities rates as low or lower are in force. To be of any force, we submit it would have to be shown that telephone service is rendered in other cities, *under like conditions and at a profit*, at rates not exceeding those fixed by this act of Congress.

In the case of *Smyth vs. Ames*, 169 U. S., p. 540, this court said:

> The claim made on behalf of the State, that the rates fixed by the Nebraska statute were much higher than the Iowa rate, was met by the consideration of the volume of business, which in one State might be greater per mile than in another, or the cost of construction and maintenance might be less, and by the consideration therefore, that *comparisons between the rates of the two States were of little value unless all the elements that entered into the problem are present*, and that while it might be true that the statutory rates in Nebraska are 40 per cent. higher than the same rates in Iowa, the mileage earnings in Iowa are greater than in Nebraska, there

being in Iowa two hundred and thirty people to each mile of railroad, and in Nebraska only one hundred and ninety.

But in this case it is not material upon which side the burden of proof lies in this regard. The conditions under which telephone service is rendered and the kind of service rendered in Detroit, Grand Rapids, Fort Wayne, Richmond, Norfolk, and Toronto are pretty clearly established by the evidence, and the conclusions to be reached are so evident that the question which would arise if these matters were left in doubt need hardly be considered.

The District of Columbia covers about sixty square miles of territory, and small towns or settlements are scattered all over it. For all practical purposes the boundaries of the city are now the boundaries of the District itself. From the exchange of the appellant to the District line the distance varies from 5 to 6½ miles. The city of Washington proper is known all over the world as "the city of magnificent distances." The proportion of the land in the city occupied by building lots is far less than in any other city, and the space occupied by streets, avenues, parks, and other public places is proportionately greater. From the time the city of Washington was founded to the present moment, it has always been contended by its citizens, and during nearly thirty years last past they have successfully maintained, that because of the very difference between this and other cities to which we have just referred—because the city was laid out upon a grand and comprehensive plan fit for the capital of the United States and not with reference to an economic administration of municipal affairs—all the expenses of carrying on the local government are twice as great as they otherwise would have been. It has been demonstrated over and over again to the satisfaction of Congress that, for the reasons stated, if the citizens of Washington were compelled to carry on the affairs of the municipality without aid from Congress the rate of taxation would

pass the limit of endurance and universal bankruptcy would follow.

Among the complainants in these very cases will be found names of many citizens of Washington who are officers of, or who are connected with, associations whose principal purpose it is to maintain this proposition. It is for the same reason that the cost of sewering and paving our streets and of policing the city is so much greater in Washington than elsewhere that the cost of constructing, as well as the cost of operating and maintaining, a telephone plant in this city is far greater than it is in any of the other cities as to which the testimony in this case has been particularly directed.

Mr. Crenshaw tells us (1069, 1074), and it is undisputed evidence, that the average distance of the subscribers here is $1\frac{9}{10}$ miles from the exchange, $1\frac{1}{10}$ miles of this distance being made up of underground conduit and the remaining $\frac{8}{10}$ of a mile by the overhead plant. Practically, for every one of its subscribers the appellant has to run its wires through a conduit an average distance of more than a mile, and then by overhead lines $\frac{4}{5}$ of a mile farther. Hence it is that with only a little over 2,000 subscribers on the day this act was passed, the appellant had in its conduits and on its poles over seven thousand miles of wire, $\frac{4}{5}$ of which, be it remembered, is copper wire and only $\frac{1}{5}$ iron and steel (185).

As to Detroit, Holmes tells us that the average distance of the subscribers of his company from the exchange would not be more than $\frac{3}{4}$ of a mile (557), and Mr. Beamer testifies as to the Michigan Company in that city that the 4,500 subscribers connected with its main exchange are not, on an average, more than $\frac{1}{4}$ of a mile away (1015). As to that company's sub-exchanges in Detroit, Beamer says that they have "very long lines—probably a mile" (1015).

In Grand Rapids the average distance of the subscribers of the independent company is nowhere directly stated, but

Ware testifies that they have 2,600 miles of wire, with 2,500 subscribers, and that only about one-half of the subscribers have a double wire (494). Hence, we find, by deducting one-third from the total number of miles of wire and dividing the remainder by 2,500, the number of subscribers, the average distance is about three-fourths of a mile. As to the exchange of the Michigan Telephone Company in Grand Rapids, Beamer testifies that the average distance is one-fourth of a mile (1019).

In Fort Wayne the average distance of the subscribers of the Central Telephone Company is about three-fourths of a mile (1060). The average distance of the subscribers of the Home Telephone Company in that city is not given, but in the nature of things it cannot vary materially from that of the other exchange in the same city.

In Richmond the average distance does not appear, but from Robertson's description of the business district of that city and his statement that 90 per cent. of his business subscribers are within the business district (880, 887), it is evident that half a mile would be a very liberal allowance for that plant.

In Norfolk, as Pannill testified, the average distance of the subscribers from the exchange is less than $\frac{1}{8}$ of a mile. In the two connected exchanges of Portsmouth and Berkeley the average distance is respectively $\frac{1}{16}$ of a mile and about $\frac{1}{2}$ of a mile (929).

The average distance in Toronto is nowhere stated. In Quebec it is $\frac{1}{5}$ of a mile (986).

Finally we have the testimony of the appellees' expert, Dunbar, who says that he has made a careful estimate in a number of large cities of the average length of subscribers' circuits and has found that it "varies but little from $\frac{71}{100}$ to $\frac{75}{100}$ of a mile" (719).

From these conceded facts it follows that the area served by the Washington plant is from 7 to 250 times as large as

that of any of the other cities in the United States as to which the appellees took their evidence.

But the foregoing is not the only difference between Washington and the other cities referred to affecting the question of what are the necessary and reasonable expenses of operating a telephone exchange. In Washington there cannot be said to be in the usual sense any "business section." It is pre-eminently a residence city. Small stores and shops we have, of course, but they are scattered from the Aqueduct bridge to Anacostia, and from the Arsenal to Columbia Heights. The great commercial and manufacturing centers which exist in other towns of the like population are not to be found in Washington. In other cities in which testimony was taken in this case the manager of one of the exchanges from his windows could survey the quarters of a large percentage of his business customers; but if a circle should be drawn with a radius of a quarter of a mile surrounding the exchange in Washington, it would scarcely take in one-tenth of the business telephones of the District.

Again, unlike Detroit, Grand Rapids, Fort Wayne, Toronto, and other cities, we have here in Washington a class of people, forming about one-third of our population, who practically do not use the telephone at all. Boyce, one of appellees' witnesses, speaks of Atlanta as having a remarkable ratio of telephones to population, "considering that half of the population was black" (508). These causes aggravate the difficulty here growing out of the enormous area covered by the city and its suburbs. As business houses as well as the residences here are spread over a much larger area than in other cities, and as the telephone users in that area in proportion to the population are fewer than in any other city approaching the size of Washington, as to which testimony has been taken in this case, the natural and necessary result is that not only the first cost, but the expense of operating and maintaining a telephone exchange in the District of

Columbia, is far greater than it is anywhere else, so far as we are informed by the evidence in this case.

Counsel, admitting the great difference in conditions when comparing Washington with other American cities of even approximately the same size, contend that only the investment accounts are affected, but it is insisted that these differences not only affect such accounts, but also in an equal or greater degree the expense accounts, especially those falling under the head of maintenance. It costs more to maintain widely scattered stations, because an employé cannot inspect or repair as many stations in a given time as he could if they were concentrated. Battery renewals are for the same reason more expensive. Cost of line maintenance is obviously proportionate to the length of the lines. It must also be remembered that with the lines widely scattered much less can be accomplished per mile of line with a given amount of labor than would be possible were they concentrated.

More surplus or spare wires in cables are unavoidable with scattered than with concentrated stations, and this surplus must be kept in good condition to prevent its throwing the working plant into trouble. Repairs to conduits can only be made by removing the pavement, and in each such case in Washington *asphalt* pavement must be removed at heavy cost. When poles decay, it becomes necessary to replace them. In Washington poles range from 55 to 80 feet in height, because here the law (29 Stats, page 678) requires that the lowest wire on any pole shall be not less than 50 feet above the ground, while in other cities small poles are used. The testimony shows that stations are frequently discontinued. While new subscribers may be constantly added to the system, others give up the service to such an extent that to make a net gain of one it is frequently necessary to connect three new stations. With the stations scattered, as in Washington, the expense of disconnecting and the loss of wire incident to these disconnections is much greater than where the stations are

concentrated and the length of line is less. Thus it will be observed that a fair estimate of the cost of maintaining a telephone plant in this city cannot possibly be based on the cost, even if clearly ascertained and fairly stated, in any other of the cities referred to in the testimony.

Because we deem it clear that the testimony relating to plants and service and rates in the other cities to which the great bulk of the evidence introduced by the appellees relates is irrelevant, we shall not consider that evidence in detail in this brief. But, for the convenience of the court, we shall print under a separate cover an appendix dealing with the testimony on that subject.

IV.

The opinion of the Court of Appeals on the question of the reasonableness of the rates fixed by the act of June 30, 1868.

Although the action of the Court of Appeals in this case in reversing the supreme court of the District was based solely upon the ground that, whether the rates fixed are reasonable or not, the appellant must accept them or withdraw from the District, yet Mr. Justice Shepard takes occasion to refer to the evidence relating to the question of reasonableness. In doing this he has inadvertently fallen into several serious errors, all of which militate against the appellant. We will, therefore, briefly consider his observations on this part of the case, taking them in the order in which they appear in the opinion (1178 to 1181).

(a.) He states that the evidence does not show "that 40 per cent. of the general expenses is the real and just proportion to be borne by the Washington plant." In this connection he adds that Baltimore is a larger city than Washington and that there are local exchanges in certain smaller

towns, the impression conveyed being that more than 60 per cent. of the business of the appellant is carried on outside of the District of Columbia.

It is to be borne in mind that the general expenses here spoken of are those of the central or head office of the company. Its principal officers and its book-keepers attend to the business and keep the accounts of the whole company, and it is manifest that some proportion of these head-office expenses should be charged to the Washington plant. Mr. Bryan, who was the president of the appellant company when the evidence was taken, testified that the receipts of the Washington plant were about 40 per cent. of the total receipts of the company, and that the distribution of these head-office expenses was made accordingly (138).

In the years 1892, 1893 and 1894 the number of exchange subscribers of the appellant outside of the District of Columbia was, respectively, 2,422, 2,677 and 2,801, the average for these years being 2,633 (54). During the same three years the number of subscribers connected with the Washington exchange was respectively 1,751, 1,822, and 1,818, the average being 1,797 (1166). The total average number of subscribers of the company, therefore, during these years was 4,430, 40 per cent. of which would be 1,772; so that during these years the Washington plant had 25 more than 40 per cent. of the entire number of subscribers. The same comparison for later years cannot be made because the Tompkins report of the Maryland exchanges does not include any complete year after 1894.

The total revenue of the appellant from exchange service outside of the District in the years 1892, 1893, and 1894 was respectively $215,811.81, $222,847.35, and $234,453.62 (54). During the same years the total revenue of the Washington exchange was respectively $164,778.32, $176,895.55, and $176,835.84, the average for each of the three years being $172,836.57 (1166). The gross average was $398,874.16, 40 per cent. of which would be $159,549.66. Hence the aver-

age gross exchange revenue of the Washington office exceeded 40 per cent. of the total exchange revenue by $13,287.

The total exchange-service revenue of the appellant in the year 1897 was $471,430.18 (96). Forty per cent. of this would be $188,572. The actual exchange receipts of the Washington office for that year (1162) were $178,254.78 plus $9,946.97=$188,201.75, being almost exactly 40 per cent.

Further, Haskins testifies that when making up his original statement he found that the proportion of the total cost of construction was about two-fifths for the District of Columbia (367).

We think we are justified in saying that the charge of 40 per cent. of the head-office expenses of the appellant to the Washington plant is shown by the evidence to be absolutely fair.

(b.) It is stated in the opinion that it is impracticable from the evidence to say for any of the years given (1891 to 1898) what was the cost of the new underground construction of the appellant, and the learned justice who delivered the opinion then proceeds to say that he averages it with considerable uncertainty. Unfortunately, he does not state what his average is, so that we are unable to follow his computation in this regard. But the evidence itself clearly discloses the exact amount paid during each of these years by the appellant for new underground construction. On pages 69 to 71 will be found the amounts paid for and charged to construction during every year in the appellant's existence from 1883 to and including 1897, the amount so spent for underground construction in each of those years being separately set forth. A corresponding table for the first nine months of the year 1898, down almost to the day on which the taking of testimony in this case began, will be found on pages 351 and 352 of the record.

(c.) Referring to the increase in expenses in 1897 over the average for the preceding five years, Mr. Justice Shepard says: "It would seem that considerable part of this, *but how much is unascertainable* from the evidence, is due to the improved conduit system before mentioned," referring to the work of replacing during that year parts of the abandoned solid-system conduits. The exact amount paid in 1897 on this account is shown by the evidence of Mr. Crenshaw, under whose superintendence the work was done, to have been $21,398.35 (199.) This does not appear in the table on page 71 for the reason that it was charged to maintenance and not to construction, as explained on page 79 of this brief.

In the same paragraph reference is made in the opinion to the fact that in the annual report of the appellant's president for the year 1897 it was shown that there had been an increase in the Washington plant of 783 poles during the year (86). This, taken in connection with the fact that there was nothing charged to overhead construction during the year 1897 (71), is taken to indicate that this increase in poles had been charged to maintenance, so as to improperly swell the expense account, yet there is in the record a perfectly clear explanation of this apparent discrepancy, *showing that there was no real extension of the overhead plant* (378, 379).

Southern Pacific R. R. Co. vs. Railroad Commissioners, 78 Fed. Rep., 286, cited at page 82 of this brief.

(d.) Fortunately, as to the important year 1898 the opinion gives some of the figures upon which the reasoning of the court is based, so that the errors of computation are sufficiently manifest. The Haskins statement of earnings and expenses per telephone for the nine months ending September 30, 1898, gives the "total expense exchange stations" as $113,528.68 (349). Mr. Justice Shepard adds one-third to this to make the year, the aggregate being $151,371.57. From this gross sum he deducts the items of interest, sinking fund, and rentals as not properly chargeable to expense,

which he says will bring the cost down to about $53, "making expenses exceed income at the $50 rate about $6,500 for the year."

The result reached by Mr. Justice Shepard shows that he deducted from the $113,528.68 the sum of $13,485.01, being the total amount paid for rentals and royalties during the nine months in question (346); but a considerable proportion of these rentals and royalties were chargeable not to the exchange, but to private lines and extraterritorial business, and had already been deducted by Haskins (349) from the total expense in reaching the amount of $113,528.68 as the total exchange expense.

The simple and proper method of making this computation is this:

Total expenses, nine months		$113,528.68
Deduct:		
Instrument rentals, exchange (346)	$10,797.87	
Interest and sinking fund (346)	14,990.00	
		25,787.87
		$87,740.81
Add one-third		29,246.93
		$116,987.74
Divided by 2,126		$55.02

(e.) In the next place it is stated that, after deducting interest, sinking fund, and rentals, the cost per telephone would be about $53, making expenses exceed receipts, *at the $50 rate*, about $6,500 per year. We have seen that after making these deductions the rate would be $55 instead of $53, and under the statute the comparison should be made not with the $50 rate, but with an average rate not exceeding $45. The maximum rates prescribed by the statute run from $50, where a single wire is used, to $25, where four or

more telephones are on the same wire. At the date of the passage of this act, June 30, 1898, of the appellant's grounded-circuit subscribers, 69 were on two-party lines and 51 on wires connected with four or more subscribers, and of its metallic-circuit subscribers on that day 55 were on two-party lines, 11 on three-party lines, and 326 on lines with four or more stations (136). Deducting these 512 party-line subscribers from the average for the year—2,126—leaves only 1,614 subscribers who could be required to pay the $50 rate. On the 31st day of October, 1898, there were of the grounded-circuit subscribers 64 on two-party lines and 46 on lines connecting four or more subscribers, and of the metallic-circuit subscribers on that day there were 55 on two-party lines, 11 on three-party lines, and 311 on lines connecting with four or more subscribers (137). Deducting these 487 party-line subscribers from the average of 2,126 for the year, and there remain but 1,639 subscribers who enter into the calculation at the $50 rate. The average maximum rate *under the statute* for all the subscribers, it will be seen, was within a few cents of $45.

[The tables on pages 136 and 137 have been criticised on the ground that 69 is not divisible by two, nor 11 by three, etc. The obvious reply is that it does not follow because a subscriber has a three-party-line contract that there will always be three subscribers on his wire. It is the right of the company to connect other subscribers with the wire which fixes the rate, not the actual fact of a certain precise number being at all times so connected If, for instance, there were 20 three-party lines, and to a single one of the wires at the time of taking the account only two subscribers were connected, the total number of three-party-line subscribers would be 59, which is not divisible by three.]

The result is that, taking the computation of the Court of Appeals and correcting obvious errors, the fact remains that, making no allowance for (1) interest, (2) sinking fund, (3) rentals and royalties to the Bell Telephone Company, (4)

depreciation, or (5) compensation to the appellant, this statute requires the appellant to do business at a rate which is at least $10 per telephone less than the actual cost of the service. This loss during the year 1898 would have been $21,260.

(f.) Even by the erroneous computation just referred to, it is stated in the opinion that the expense would exceed the income $6,500 per year. In order to still further reduce the expense, so as to show the possibility of some profit, it is next suggested by Mr. Justice Shepard (1181) that the expense per telephone of the appellant for salaries and wages is at the rate of $37.70 per annum, and that this, when compared with the expenses of other cities, appears to be too high.

Here again a mistake is made as to most of the period under inquiry of about $10 per telephone per annum. The learned justice who wrote the opinion had reference to the tables Exhibits "H," "I," and "K" (72 to 81). These tables, taken in connection with the testimony of the witness by whom they were introduced (378), show that the pay-rolls of the appellant in the latter part of March of the year 1898, on the 1st day of July, 1898, and on September 30, 1898, were at the rate per annum, respectively, of $82,737.19, $75,899.12, and $81,584.14. These amounts, divided by 2,126, the average number of telephones in 1898, give the respective sums of $38.91, $35.70, and $38.37, approximating closely the $37.70 mentioned in the opinion. But, as stated in a note at the foot of the first of these lists (75), these aggregates are in excess of the actual amount paid during the year, because many of the employés are paid by the day, and lose a large amount of time during the year from illness or on account of the work being stopped by inclement weather, etc. The actual amount paid for salaries and wages during each of the years under investigation is shown in the record to a cent (1162, 1163). The average amount

paid for salaries and wages during the six years, 1892 to 1897, was as follows :

On account of maintenance	$25,085.58
On account of operating expenses	13,538.71
On account of general salaries and wages (40 per cent. of the whole)	12,264.49
Total	$50,888.78

The average number of subscribers during the six years being 1,823.5 (1166), the average amount per subscriber paid per annum for salaries and wages during the six years was $27.90, instead of $37.70, as estimated by Mr. Justce Shepard.

For the first nine months of 1898 the amount paid for salaries and wages (349) was as follows :

On account of maintenance	$31,590.29
On account of operating expenses	11,631.35
On account of general expenses (40 per cent. of the whole)	10,859.97
Total	$54,081.61
Add one-third for the year	18,027.20
	$72,108.81

The average number of telephones during 1898 being 2,126, this amounts to $33.90 per subscriber, instead of $37.70, as estimated by Mr. Justice Shepard. The average amount paid for salaries and wages per subscriber per annum for the whole seven years was $28.76.

(g.) Equally erroneous is the paragraph under consideration in its reference to Toronto and Detroit. Mr. Justice Shepard states that the total average expense per subscriber in Toronto is $25.26 per station, and in Detroit $20.95 per

station, which figures he compares with the $37.70 which he assumes Washington pays for salaries and wages alone. The average expense per station of the 5,932 stations in Toronto in 1892 was $37.08, instead of $25.26 (998). The evidence deals with two telephone exchanges in Detroit. One of these was operated by the Detroit Telephone Company, or "the independent company;" the other was one of the exchanges of the Michigan Telephone Company. Mr. Justice Shepard does not state to which of these he refers when he gives $20.95 as the average total expense per station in Detroit, but no doubt he had in mind the evidence of the witness Holmes, who was the president of the Detroit Telephone Company, and who testified (from a memorandum in his possession) that in 1898 his company's receipts were $165,773.97, and its expenses $97,097.92 (452). This witness' testimony and the financial transactions of his company have been referred to above and are fully discussed in the appendix to this brief in dealing with the evidence generally relating to the city of Detroit. It is sufficient to state here that the only testimony as to the expenses and receipts of the Detroit Telephone Company is that of Holmes; that he had no personal knowledge of the contents of the books, not even knowing the salaries of his own officers and book-keepers, nor how the books were kept (466, 467); that the principal book-keeper, who was said to have furnished the memorandum from which Holmes gave the above figures at the time Holmes was examined at his own private office, was in the office of the Detroit Telephone Company, and could have been produced in ten minutes (461–464); that the book-keeper was not put upon the stand or any reason given for not calling him; that on cross-examination Holmes refused to allow the books of the company to be examined by the appellant's counsel, and that after he had further testified on cross-examination that the company was in debt and always had been in debt in a very large sum he was asked on cross-examination how this happened to be the case when the

company's receipts during the year were $165,000 and its expenses only $97,000, and he replied, "I never said that our expenses were only $97,000.00" (553). This witness' testimony was objected to as incompetent, because he had no personal knowledge of the books or how they were kept, and because he refused to produce the books themselves (545, 549, 565).

The only telephone exchange in Detroit, therefore, as to which there is any competent evidence of its expenses is that of the Michigan Telephone Company. The books of account of that exchange were produced at the request of counsel for the appellant, and from a computation made from them by the book-keeper who had charge of them from entries which were duly proved, and which were submitted to the counsel for the appellees for inspection and examination, it appeared (1044) that the average expense per subscriber of that exchange for the last five months of 1896 was $21.55, and for the first five months of 1897 $18.13, or $39.68 for the whole ten months. Adding one-fifth to get the yearly expense, we find that the result is $47.61, or nearly two and one-half times the figure given by Mr. Justice Shepard as the expense of carrying on a telephone exchange in Detroit.

(h.) Finally, Mr. Justice Shepard states that it does not appear as to the Washington exchange what proportion of the expenses is due to the "outside connections" or to the private lines. It is not easy to see how this misapprehension arose, because the amount of expense incurred by and chargeable to both the outside connections and the private lines is distinctly set forth in the Haskins statements, both as to the six years from 1892 to 1897 and as to the year 1898. The private-line expense, rentals, and royalties for the six years from 1892 to 1897 averaged $2,354.08 per annum (1166). The average annual royalty on extraterritorial business during the same period was $662.84 (1166).

Of course, as to many items of expense, such as all those incurred, for instance, at the head office, it would be impossible to absolutely distinguish between the expenses incurred on behalf of the extraterritorial business and those incurred on behalf of the exchange. A reasonable approximation is made in this regard by Mr. Haskins (and Mr. Tompkins) by taking the proportion which the extraterritorial and miscellaneous receipts for any particular year bear to the total receipts for that year and charging a corresponding proportion of the general expenses of the Washington plant to the extraterritorial and miscellaneous business. This is done for the six years in question (1166, 1167), the average for each of the years being $3,977.46 (1167). In the same way, as to the year 1898, it is shown that the private line expenses for nine months amounted to $917.80, the royalty on extraterritorial business for the same period to $424.17, and the proportion of general expenses applicable to extraterritorial and miscellaneous revenues to $5,052.52. These items are all deducted from the expense account before giving the " total expense exchange stations," $113,528.68, *from which sum alone the calculations as to the expense per subscriber for 1898 are made* (349).

The lamentable consequences that might result to the appellant from such a series of errors as this leading to a conclusion wholly different from the real fact as to the expense of maintaining and operating the appellant's exchange give additional force to the suggestion already made that the proper way to meet the testimony of Haskins and Tompkins, if it could be met at all, was by having skilled accountants, selected by the appellees themselves, go over the accounts and vouchers of the appellant in the same careful and painstaking way in which they did their work. And since this was not done, their testimony and the statements which Haskins prepared, and which, as to the years 1892 to 1897, Tompkins verified, are unimpeached and should be assumed to be correct.

As to the claim that with lower rates there will be more subscribers, and that as the number of subscribers increases the cost per subscriber decreases.

The appellees urge that even if with about 2,200 subscribers the statutory rates are too low, yet that if those rates were adopted there would be a great rush of new subscribers, increasing the total number to 8,000 or 10,000, and that this, great increase in subscribers would enable the appellant to profitably carry on a business that might not be profitable with but 2,200 subscribers.

Counsel do not tell us how the appellant is to be made whole for the loss it would sustain, even on this theory, during the interval between the enactment of the law and the taking into the exchange of these thousands of new subscribers; nor do they make any provision for the difficulty that would arise if the appellant should accept the statutory rates depending upon this tremendous influx of new subscribers and should be disappointed in such expectation.

It seems reasonably clear that rates which a public-service corporation is bound to accept instanter must be such as are reasonable at the time they go into effect, but we need not discuss that question, because it has been settled for us by this court in *Smyth vs. Ames*, as that case is reported in 171 U. S., 361. It is there said:

"Of course the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation."

The act under consideration fixes rates which vary only with the number of stations on a wire. They are uniform (flat), regardless of the amount of service that may be required, and they are the same in all parts of the District, regardless of the distance from the exchange or even from the city limits.

With these conditions, the evidence in this case shows

beyond peradventure that as the number of subscribers increases, the cost per subscriber does not decrease, but increases. We do not mean to say that this holds good in every exchange and with every increase, but that, in the long run and with the conditions stated, wherever the increase is substantial this is the necessary result. This proposition will seem reasonable enough when there is taken into consideration the difference between the service rendered each subscriber in a small exchange and in a large one. But it is not necessary to theorize; the evidence demonstrates the fact.

As the number of subscribers increases in a telephone exchange where the rates impose no restrictions upon the use of the service the average use increases.

Mr. Bryan testifies that in both Baltimore and Washington the average calls per subscriber doubled in a period of about ten years (148). In the report of the telephone commission of Maryland, made in 1896, it was stated that in 1885 the calls per subscriber in Baltimore averaged 6.2 per day; that in 1894 the average had increased to 10 per day; that at the date of the report, January, 1896, the average was 12, and that the rate was constantly increasing.

Mr. Nevius, who has been in charge of the switch-board and operators in Washington ever since the exchange was started, testifies that from 1887 to 1892, while the subscribers to the Washington exchange increased 32½ per cent., the calls per subscriber increased 78 per cent. (231).

On cross-examination Mr. Nevius gave the dates of the several "peg counts" from which he made his computations and the result of these counts (263), which, when compared with the number of subscribers to the exchange during the same periods (165), shows the correctness of his calculations, so far as that can be determined by experience. The table on this subject put in evidence by Nevius tends even more strongly in the same direction (65).

The evidence of Nevius as to the experience of the Wash-

ington exchange is corroborated by that of two of his operators (394 to 402). It is true that on cross-examination Nevius and these operators expressed opinions as to the extent to which this increase in calls per subscriber would be likely to go if the number of subscribers should be largely increased, which are not sustained by the experience of larger exchanges; but this does not affect the value of their testimony as to what had actually occurred in the past under their personal observation or militate against the conclusion sustained by all the evidence that there will continue to be *some* increase in calls per subscriber as the exchange grows, if the flat-rate system of charges should be continued by force of the act of June 30, 1898.

Farnham, after an examination of the statistics of the Washington exchange, reaches the same result (306), and states that it is corroborated by the experience of the 200 exchanges in the States of Maine, New Hampshire, Vermont, and most of Massachusetts, which are included within the operations of the company of which he is the electrical engineer (289–291).

The correctness of this theory is strikingly illustrated by the statistics as to the exchange at Toronto. Mr. McFarlane was examined as a witness in the case by the appellant, but no inquiries were made of him on this subject, and his testimony on this point, therefore, is the evidence of the appellees. By comparing the table which he gives as to the number of subscribers in Toronto at different periods (969) with the calls per subscriber during the same period (986), it will be seen that in 1893, with 4,611 subscribers, the calls were 8.98; in 1894, with 4,732 subscribers, the calls were 9.96; in 1895, with 5,033 subscribers, the calls were 10.99; in 1896, with 5,219 subscribers, the calls were 12.02; and in 1897, with 5,497 subscribers, the calls were 13.2.

The statistics as to the New York exchange, translated from a German newspaper and put in evidence by the coun-

sel for the appellees, show that in New York city, with an increase in subscribers of 21 per cent., the average calls increased 27 per cent. (1123).

Far more important is the disproportionate increase in the cost of the central office equipment as the subscribers increase in number. The different kinds of switch-boards are fully described by Mr. Farnham in his cross-examination (333 to 337).

The switch-board known as the multiple switch-board is conceded by everybody (with the possible exception of Keelyn, who manufactures switch-boards himself) to be the most efficient. It has the obvious advantage of enabling a connection between any two subscribers of the several thousands that may be connected to the same exchange to be completed through the agency of a single operator, and, because it must be so constructed that each operator can easily reach all the subscribers to the exchange, it necessarily follows that each new subscriber must be connected with each division of the board. If, for instance, an exchange has 2,100 subscribers, the board will have seven divisions, with three operators to each division, and all the subscribers will be connected directly with each division. If 300 new subscribers were added, it would be necessary to add a new division, with three operators, *and besides to connect each of the new subscribers with each of the seven existing divisions of the board.* The result is illustrated by the testimony of Farnham (291 to 297–331) and Crandall (217–219, 245, 246, 250–253), and by the charts introduced in evidence in connection with the testimony of these witnesses. Nevius gives testimony to the same effect as a result of his experience of over twenty years (233, 234). The testimony of this witness for the appellant is corroborated by the appellees' witness Boyce, who estimates the cost of a board for 2,200 subscribers to be $24,528, and the cost of one for 4,400 subscribers to be $67,895 (504, 505). This is because the greater part of the switch-board apparatus increases in a

geometrical ratio, while the subscribers increase in arithmetical ratio (Boyce, 520, 521). Crandall testifies that while a switch-board for 2,200 subscribers would cost $34,000, with 4,400, 6,600, and 8,800 subscribers respectively the cost would be $95,977, $185,000, and $303,000 (219). Mr. Farnham does not give any figures as to the cost of a switch-board, but states that a large board costs more per subscriber than a small board, "and this cost ever increases as the size of the board increases" (331).

The increased use per subscriber and the resulting increase in cost per subscriber as an exchange grows is well illustrated by the evidence as to the number of subscribers cared for by one operator in exchanges of different sizes. In Washington the disparity in this respect was not as great as it otherwise would have been, for two reasons: First, in the early years there were many party lines, which had a tendency to diminish the use of telephones by subscribers; and, second, the improvements in switch-board apparatus enabled an operator from time to time to take care of more calls (174–243). Still, while the number of subscribers from 1890 to 1898 had increased only about 31 per cent., the number of operators during the same period had increased about 55 per cent. (165, 166).

In Toronto, with some 6,000 subscribers, the maximum number of lines one operator can take care of is 35 (McFarlane, 969). The same witness tells us that when the Montreal exchange was started, with a small number of subscribers, each operator had 100 lines, but now one operator is required for every 30 subscribers (982).

In Europe, where the use of the telephone by subscribers is comparatively infrequent, the number of lines per operator runs from 80 to 150 (Bethel, 1123). In New York city the average number of subscribers per operator is only 62 (Bethel, 1140).

But it is not only in the cost of the switch-board and in the expense of its operation that the cost increases out of pro-

portion to the increase in the number of subscribers. The same law applies in a large degree to the cost of maintaining the equipment of each subscribers' station and to the maintenance of that part of the plant which connects the exchange with the subscribers' station.

Very strong evidence on this point is the experience of Mr. Maynard, the founder of the telephone-exchange business in Washington. He started out with a few subscribers and with a uniform flat rate not materially differing from that fixed by the very statute in controversy in this case. He found on beginning in a small way that with a $4 per month rate for each of one hundred subscribers he could make a profit, and he very naturally expected that with several hundred subscribers his profits would proportionately increase. But to his astonishment he found that the result was exactly the contrary, and he was compelled to raise his rates from time to time until they reached $6 per month, or do business at a loss (404, 405). Besides his experience in Washington, Mr. Maynard has made careful study of the subject in numerous other exchanges, among which he enumerates Baltimore, Philadelphia, New York, Springfield, New Haven, Hartford, Providence, Pittsburg, Indianapolis, Toledo, Cleveland, Detroit, Chicago, and Binghamton (405–412), and in this way has found that his experience in Washington is confirmed. It must be remembered that if Mr. Maynard has any bias in this case, it is against the appellant (418), and that before he had been approached by counsel for the appellant, with a view to getting his testimony, he had been sounded by counsel for the appellees, and had given them the same information which he now gives to the court (418–421).

Sargent, after an experience of over twelve years as general manager of a large number of exchanges, having from a few hundred to 8,500 subscribers, states that the cost of a telephone plant and the cost of operating it increases per sub-

scriber, and that *with a flat-rate service* it is absolutely necessary to increase it as the exchange grows (423, 424).

Another important witness on this point is Pannill, manager of the Norfolk independent exchange, whose evidence was taken on behalf of the appellees and all of whose testimony was given under compulsion and with great reluctance. On his direct examination he made a remark which indicated that his company was not trying to get new subscribers *unless they were close to the exchange* (929). On cross-examination he was asked what he meant by this, and he replied that they found that if they got any considerable increase in the number of subscribers they would have to enlarge their whole plant (935).

On redirect examination, an attempt was made, by argument and leading questions of the most objectionable form, to induce the witness to modify this testimony. He was told in so many words by the appellees' counsel "that is something that our friends on the other side have advocated" (937). But these ill-advised efforts were unavailing, the witness stating as a result of his experience and referring to the operation of a telephone exchange:

"This is one peculiarity of the business, that the more subscribers you get, are the profits in proportion decreased" (937). * * * "I mean that I would rather have 500 subscribers at a cost of a hundred dollars a station at the rate of $30 per year, than have a thousand subscribers at a hundred thousand dollars' cost." * * * "We find that the money is in the small plant with these low rates that we are getting. In other words, we have 200 in Portsmouth. That pays us a better dividend for the money invested than the 1,000 subscribers pay us over here" (940, 941). * * * "If you want my opinion frankly, I think it would be best for a fellow not to have the plant at all. If he has got the plant completed and a $30 rate for 3,000 subscribers he is bound to go into bankruptcy. He cannot do it. I should think the fellow would be better off without the exchange" (942).

McFarlane expresses the same opinion as a result of his long experience as general superintendent of the Canadian company, controlling several hundred exchanges (975–982). Being pressed on cross-examination to state whether, with a given exchange, he would rather have 100 subscribers than 300, he replied:

"When you get into small units like one hundred and three hundred there is not a very vast difference; but when you go from 100 to 1,000, or from 1,000 to 5,000, there is a very great difference in the cost per subscriber" (983).

Thorwald, who was first examined on behalf of the appellees while he was employed by the Home Telephone Company at Fort Wayne, was recalled by the appellant shortly after his connection with the Fort Wayne company had been terminated, and he then confessed that for about a year that company had not tried to increase the number of its subscribers, giving as a reason: "We felt we could get along better with less subscribers. That is my experience and the experience they are having now" (1056).

Bethel's testimony, growing out of his long experience with numerous large exchanges in the city of New York, is to the same effect. He says that his opinion is (*with flat rates*) that "it would cost us more per station when we were serving the 20,000 than when we were serving the 10,000" (1121).

The testimony of Preece on this subject, given in 1895 before a committee of the House of Commons in England, will be found on pages 298, 299, and 300. He says, in so many words, that not only the calls, but "the cost of the mechanical work (that is, engineering and maintenance) will increase *pro rata* with the number of subscribers and the number of circuits" (300).

So the French expert, Hospitalier, in his article on the new telephone system of Paris, shows how the Paris ex-

change was swamped by a reduction of the rate from $120 to $80, and says:

"Sooner or later, and by the very force of circumstances, the price of $80 will become inadequate, and it will be necessary either to increase it or to make the budget support the deficit. The subscribers to the telephone will thus become new privilegees of the State" (301, 302).

In the argument of this case before Justice Barnard and in their brief before the Court of Appeals counsel for the appellees attached great weight to the testimony of Mr. Ahern, who was, as they said, "for many years at the head of the maintenance department of the Chicago (Bell) Company." He also superintended the construction of the plant of the Detroit Telephone Company and of many of the plants of the New State Company in Michigan. This witness was examined by adverse counsel on the subject we are now considering, and in reply to their questions he gave as his opinion that it would cost about 12½ per cent. more per subscriber to operate a plant for 4,000 subscribers than one for 2,000 (857).

More significant than all this direct testimony is the fact admitted by all that wherever telephone exchanges are known this rule obtains, that the fewer the subscribers the lower the rate. Bryan testifies that within the territory of the appellant company the rates are lower in the smaller towns (279). Mr. Holmes, one of the appellees' witnesses, referring to Detroit, says, "In *a city of this size* our rates ought to be higher than they are" (471).

Mr. Ware, another adverse witness, gives the rates of the independent companies in various towns in Michigan, and, referring to the smallest towns with the lowest rates, he says: "The strange part of it is that at these rates there is a small profit, because there is no expense attached to maintenance scarcely" (484).

Keelyn, whom nobody accuses of friendship for the appel-

lant, testifies: "As a rule, I should say that the rate was higher in the larger cities" (781).

In Canada the same rule obtains (965, 984).

The appendix to this brief, relating particularly to conditions in other cities, shows that, except in a few cases, the rule obtains also throughout Europe; and not only does this rule hold as to places smaller than Washington, but it will be observed that rates in the larger places also conform to it. In the principal cities of America the rates, as shown by a table reproduced in the appendix (page 25), are in some cases from three to five times as high as those fixed by the statute for Washington. Because of its great extent in area and its other peculiar conditions, already referred to, Washington, we submit, ranks, for the purposes under consideration, with American cities having a far greater population.

We have upon this point the testimony of the experts of the independent companies in convention assembled in June, 1899. The exhibit containing the proceedings of that convention was inadvertently omitted from the record in the Court of Appeals by the appellees here, but by stipulation of counsel the omission is corrected here as it was there. At that convention a paper was read by Mr. E. Fisher, and a discussion ensued on the question we are now considering. Mr. Fisher said:

"We know of exchanges of 100 or 200 'phones that are undoubtedly being successfully operated in their communities at very low figures of cost. It has been believed, by those not well informed, that the larger systems ought to be and can be operated at similar cost. It is true in the telephone business, as it is not true in most other business, that the larger the business the greater the expense *pro rata* and *per capita* for operation and maintenance as well as for construction; where, in a plant of 1,000 'phones, a rate of, say, $20.00 to $30.00 may be fairly successful, in doubling the plant it will materially increase the cost of building, and compel a still greater increase in the cost per 'phone in operating."

* * * * * * *

"I found in visiting various places in the middle West that a great many people seemed to imagine that because a company with 250 or 300 or 400 telephones was prosperous at rates that are common in plants of that size, that it was entirely possible to operate a plant in a city like Grand Rapids or Detroit or Cleveland at the same figure. People say it is like any other business, you can do it wholesale cheaper. I found, in trying to secure contracts for operations, and in the case of persons trying to secure franchises, that city councils have met them with that general idea, and in some cases those who would invest in the telephone business have been careless, and have accepted rates that were almost certainly destructive of their investment.

"Now, I simply want in this connection to sound a note of warning, and have each one of you say to your neighbors and friends that they must be careful in that direction; that they must not get the impression because they are operating plants in towns of 5,000 or 6,000 successfully at a given rate, that they can go to a town of 40,000 or 50,000 and operate at a greater profit because of the larger number of possible patrons."

Following what is shown by the testimony to have been common practice, the appellant company had prior to June 30, 1898, imposed an additional charge for telephones remote from the exchange (436). Thus the rates operated to limit to some extent the length of lines. That the cost per telephone of maintaining the plant is affected largely by the average length of line and by the scattering of the subscribers over a large area, we have elsewhere shown. The act under consideration fixes uniform rates throughout the District, and manifestly any considerable increase in the number of subscribers must be largely derived from people remote from the exchange, with an increase in the average length of line and a consequent increase in the average cost of maintenance.

Against this overwhelming array of evidence counsel for the appellees in the Court of Appeals referred to certain statistics for the years 1895, 1897, and 1898, relating to the

Toronto exchange. But it will not do to take the figures for two or three years of any exchange and draw conclusions from them. Sclater testifies, in so many words, that in some years the Toronto exchange would spend more than 10 per cent. of the value of its plant in replacements, while in other years there would be practically no expenditure on that account (1003). The Toronto exchange has been in operation since 1881 (1001). If counsel had given us the number of subscribers in Toronto and the total expense for a considerable number of consecutive years, some inference might be drawn from them that might be of value.

To show the fallacy of their reasoning, suppose we should take the corresponding figures in Washington for the years 1896 and 1897, as shown by Haskins' tables. In 1896 the subscribers were 1,879 and the average expense $61.26. In 1897 the subscribers had increased less than 10 per cent., while the expense per subscriber had increased about 40 per cent.

On the other hand, the appellees might show by the Haskins statements that in 1895 the expense per subscriber was something less than in 1896, when the number of subscribers had slightly increased, and that in 1898 the expense per subscriber was about twenty dollars per subscriber less than in 1897, notwithstanding a considerable increase in the number of subscribers. This is readily explained as to comparisons made with 1897 by showing that in that year there was an unusual expenditure for maintenance, growing out of the replacement of the abandoned "solid system" and the legislation of Congress allowing reconstruction of alley lines, &c., which had been prohibited for several years before 1897 (Crenshaw, 203). But when we take the whole period from 1892 to 1898 a steady increase in subscribers and in the expense per subscriber is shown. No doubt, a similar showing as to Toronto would produce a similar result. That this is the experience of all the Canadian exchanges is established by the testimony of McFarlane (975, 982, 983).

The probable effect of this law upon the gross earnings should also be considered. When the law was enacted a very large percentage of the total number of subscribers were using telephones "on a separate wire" (136), the rate for which under the law is $50. But, with a difference of $25 per year between the "four on a wire" and the "separate wire" rates, a large reduction in the average rate might reasonably be looked for. With one-half the subscribers at $25 and the other half distributed equally among the other rates, the average rate would be $32.50 per year. With one-half at the $50 rate and the other half distributed equally among the other rates, the average would be approximately $41. With a considerable increase in subscribers, it is reasonable, therefore, to assume that the average rate would fall somewhere between $32.50 and $41 per year.

The result of the examination of this suggestion, therefore, instead of indicating that the appellant will be relieved by a great increase in its business growing out of the lower rates fixed by the statute, shows conclusively, we think, that the act, unreasonable and confiscatory now, must become more and more so as time goes on.

This but brings out one of the greatest defects in this ill-advised piece of legislation. It provides no means for changing the rates at any time in the future, however unreasonable and unjust they may become. In this it differs from corresponding legislation everywhere else; for in the acts of the State legislatures which have come before this court involving this question it will be found that always there is provided a commission of some kind with authority to fix rates and from time to time to alter them; but this law makes no provision for the disproportionate increase of expenses and the consequent necessary increase of rates which would follow any considerable increase in the number of subscribers under the conditions which it imposes. It is unreasonable not only for the present, but also for the

future. Enacted without inquiry or investigation, it can be right at any time only by accident.

The testimony in this case shows that a rational rate plan, under which the amount paid by each subscriber is proportionate to the service rendered to him, has brought about a great and rapid extension of the use of the telephone in other cities (99, 423). The appellant company introduced such a plan soon after it was introduced in these other cities and before the law under consideration was enacted (436). Except for the enactment of this law a similar development would doubtless have occurred in Washington, resulting in an adequate telephone system such as the Nation's capital should have.

The telephone service having become an important factor in the conduct of social and business affairs in this city, as in all other important cities throughout the world, clearly the aim of Congress was not to force the appellant company to retire from the city, but only to impose reasonable regulations, which would result in extending the use of the telephone at fair rates. Proceeding without inquiry, Congress, we submit, erred, and defeated its own purpose by fixing a scale of charges that, if enforced, would result in the appellant's ruin.

For these reasons, we respectfully submit, the holding of the Court of Appeals should be reversed and the case remanded with instructions to dismiss the bill.

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No. 363.

App't to Br. of Griggs & Worthington for Appellant.

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No. 363.

APPENDIX TO BRIEF FOR APPELLANT, BEING A CONSIDERATION OF THE EVIDENCE RELATING TO CITIES OTHER THAN WASHINGTON.

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Supreme Court of the United States

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, *Appellant*,
vs.
J. FORREST MANNING ET AL., *Appellees.*
No. 363.

Appendix to Brief for Appellant, Being a Consideration of the Evidence Relating to Cities Other than Washington.

DETROIT AND THE EXCHANGES IN MICHIGAN OF THE NEW STATE TELEPHONE COMPANY.

The principal witness relied upon by the complainants as to telephone service and rates in Detroit is William L. Holmes, who, when his testimony was taken, was president of the Detroit Telephone Company.

Holmes informs us that up to about two years before he testified he "was not thinking of the telephone business much" (455). When attention was called on cross-examination to the smallness of his salary he said, apparently by way of explanation: "The telephone business is not my business, any way. I have my own business to attend to" (471). Neither he as president, nor any one else in any capacity, had ever made to the company of which he is president an annual statement (452). He never looks at the books of his company if he wants information, but asks the book-keeper

for it (466). He accordingly declined to give any information as to the system of book-keeping or the manner in which any particular entries were entered in the books (467). Being asked what entries are made regarding the expense of new installations, he refers counsel to Mr. Ahern, whose business, he says, it is to have constant watch over the plant and to attend to its business generally. (When, a little further on, he was asked what wages his company paid to laborers, complainants' counsel interrupted to inform us that they would give us all these details through Mr. Ahern. Ahern was subsequently examined, but the promised information was not given.)

As to the cost of his company's plant, Holmes admitted that his information was so slight that he could only guess at it (476, 477). Although he testified as to the exact operating expenses of his company during the first ten months of 1898, he did not know what items entered into that aggregate (565). He could not tell what were the salaries of his own officers and book-keepers (566). He did not know what wages were paid to his laborers (475). As to the financial transactions of both the Detroit Telephone Company and the New State Telephone Company, he testified entirely from memoranda furnished him by the respective book-keepers of those companies, admitting that the only basis for his testimony was his confidence in his book-keepers (457, 459, and 464). Both the book-keepers were then at their respective offices, and if wanted could have been produced in ten minutes (461, 464). He does not know the average distance from the exchange in Washington of the defendant's subscribers, and does not even know in what part of the District the central exchange is situated (558).

Holmes figured at the same time as a director of four different companies in Detroit in the telephone business, the membership of the board of directors of the four companies being substantially the same. Each of these companies had financial transactions with some or all of the others, the

members of the several boards of directors being interested in both sides of the transactions (462, 463–465, 542, 543, 562).

Holmes stated that the books of the Detroit Telephone Company would show what its plant cost, but he declined to produce those books to be examined for the purpose of ascertaining what that cost was (474–477). He would not allow them to be examined either in his real-estate office, where the testimony was taken, or at the office of the company, where the books were kept (477, 478). Although he had testified that the first of his four companies, the Detroit Telephone Construction Company, had transferred its franchise and assets generally to the second of the four companies, the Detroit Telephone Company (542), he refused to state what the consideration of that transfer was. He subsequently said that the consideration was $300,000 in stock in the second company, but refused to submit the stock certificate book for examination. He said the book would agree with his evidence, but that he would not produce it and corroborate his evidence in that way (544, 545). Admitting that as a holder of stock and bonds in the Detroit Telephone Company he was interested in making as good a showing as possible for that company by his testimony, and stating that he did not know how many stockholders the company had, but that the books would show it, he again refused to allow counsel to see those books (549). Having testified that the Detroit Telephone Company had money enough in bank to pay all its obligations, he refused to walk to one of his own telephones in his office and find out what that balance was (553). He then stated that he could guess the amount near enough. He refused to state what his guess was on the ground that counsel were prying into his company's affairs (554). He admitted that he was testifying voluntarily and without a subpœna, and being thereupon asked why he gave only such information as he preferred and concealed the rest, he replied, "I think I

have given testimony on everything that is material that has been asked" (554). After testifying that the New State Company had been paying dividends from its earnings, and during the same period had sold stock, he refused to allow the books of the company to be examined for the purpose of ascertaining whether in fact the proceeds of the sales of stock had not been used in paying dividends, and bluntly said that on that subject the court in Washington must take his word for it (564). Although while testifying he held in his hand a statement furnished him by the auditor of the New State Company as to its receipts and expenses, from which statement he gave his testimony, he refused to allow cross-examining counsel to see the statement itself, telling counsel that they could put the auditor of the company on the stand if they wished to verify his figures (564, 565). Holmes having stated that the New State Company had sold stock to the amount of $300,000 and had paid $60,000 commissions on the sale, he reluctantly divulged that he was the principal agent, receiving and distributing the commissions, but he refused to tell the amount of the commission which he received in this way (559). Holmes at that time was president of the company (449). It was in debt right along to another of his companies, which debt it had not paid, because it had not had enough money (563). He substantially admits that the New State Company had declared and paid dividends, ostensibly on all stock, but really only on the small portion of its stock which was held by those who were not members of the ring which controlled the company. And he evaded answering the question whether he knew of any honest purpose that could be subserved by such a proceeding (560, 561).

At first the Detroit Telephone Company paid Holmes a salary of one hundred dollars, then it was reduced to fifty, and at the time of giving his testimony he was serving without any compensation (471). In the same way the salary of Ahern, their superintendent, had been reduced from $250 to

$50 a month (472). Although he had undertaken to testify from the hearsay statements which he had received from his book-keeper that the Detroit Telephone Company had received in cash from the sale of stock and bonds $600,000, and that the plant had cost only $600,000, and that the earnings of the company largely exceeded its expenses and dividends, he was compelled to admit that the company was constantly borrowing money and had been for months indebted to its directors in the sum of from $60,000 to $75,000 (552). On his direct examination, testifying from the memorandum in question, Holmes had said, in speaking of the Detroit Telephone Company, that for the last year "the operating expenses, including the salaries, printing, stationery, insurance, taxes, postage, operating girls, repairs, rent, light, and every expense of every nature, were $97,097.92" (452). On the next day, during the continuance of his cross-examination, when he was being pressed to explain why his company was in debt all the time for such a large amount when its receipts during the year were $165,000 and its expenses only $97,000, he replied, "I never said that our expenses were only $97,000." When avoiding giving information himself he had referred cross-examining counsel to Ahern as the man whose business it was to have constant watch over the plant and tend to its business generally (468); yet when it came out that Ahern's salary had been cut down from $250 to $50, he explained it by saying that Ahern was connected with the company "simply in a supervisory position" (472). Without spending further time on this witness, we invite the attention of the court to his testimony as to the manipulation by him and the other directors of the stock and bonds of the various companies with which he was connected (544, 545, 546, 547, 549, 550, 554), and to the fact that he is flatly contradicted by Ahern when he says the latter was paid nothing by the Detroit Telephone Company for the use of his patents (Holmes, 557; Ahern, 855).

All the material parts of Holmes' evidence were seasonably objected to, because he was giving hearsay testimony of the most flagrant character, and because he refused to answer material questions, and because he refused to allow the books themselves to be examined, or even to exhibit the book-keeper's memorandum from which he testified (459, 476, 477, 478, 545, 554, 565).

But assuming that his evidence is of value in the case, what does it tend to prove? The only thing that clearly appears from it is that the plant of his company in Detroit cost about $600,000, or in the neighborhood of $120 per telephone. If we suppose that that plant actually cost only $600,000, that fact rather confirms, than militates against the conclusion of the defendant's witnesses that such a plant as existed in Washington in 1898, with less than one-half that number of subscribers, would cost $450,000. In the first place, the average distance of the subscribers' stations in this Detroit exchange is not more than three-fourths of a mile (Holmes, 557). The area covered by the Washington plant, therefore, is nearly six times as great as that covered by the Detroit plant, and the immense additional extent of the outside plant, both overhead and underground, thus made necessary would naturally lead to the expectation that if a plant in Detroit for 5,000 subscribers would cost $600,000, a plant in Washington for 2,200 subscribers would cost at least as much. The cheap and careless manner in which the underground conduits of this company were laid in Detroit is narrated by the witness Beamer (1021). Iron wire is used almost altogether, and the poles are overburdened with wires (1077). Crenshaw says that Grand Rapids and Detroit have the heaviest-loaded pole lines he has seen in his travels (1089).

The plant of the Michigan Telephone Company affords no safer comparison with Washington. The average distance of the 4,500 subscribers to the central exchange of that company is only about one-fourth of a mile (1015). As in

the case of the Detroit Telephone Company, they laid none of their conduits under asphalt pavements (1016). Their poles ran from 20 to 30 feet, and the average cost of the poles set ready for cross-arms was only $8. On many of their poles they have as many as 11 and 12 cross-arms, each cross-arm having 10 wires on its upper side and 10 on its lower side, making 200 wires altogether. To these free wires are added on the same poles aerial cables carrying as many as 300 more wires. Steel wire was used, and for cheapness the common return system was in vogue (1018). All over the city the pole lines were overloaded (1021).

As to the financial success of the Detroit Telephone Company, according to Holmes' testimony, such as it is, its receipts for the year 1898 were $165,733.97, and its operating expenses $97,097.92, the difference being $68,676.05 (452). In this statement no account is taken of depreciation. Ten per cent. upon the cost of the plant would be $60,000, and would of itself practically wipe out the alleged supposed profit. It is interesting to observe that Holmes states that the year's interest on the company's 6 per cent. bonds amounted to $36,000 (452). This shows that they had issued bonds to the full amount of the plant. They had also issued stock of the par value of over $500,000 (Holmes, 451). The average price realized for the stock and bonds together did not amount to more than 55 per cent. of their par value.

It is obvious that the same differences, both as to extent and method of construction, that rendered the first cost of the Washington plant so much greater per subscriber than that of the Detroit plant would apply in a still greater degree to the running expenses of the two plants.

As to the exchange in Detroit operated by the Michigan Telephone Company, the only evidence as to its receipts and expenditures offered by the complainants is the testimony of Akin, who was in the employ of that company as an accountant prior to August, 1897, at which time he left that company to take the place of auditor of the New State Tele-

phone Company (574). Akin testified to the contents of a paper which he had prepared shortly before he left the Michigan Telephone Company, saying that by a statement in writing which he then submitted to the president of the Michigan Telephone Company, *it was shown that the annual* cost per telephone of that company was sixteen dollars and some cents. His exact language was:

"I cannot recall the cents; ninety-four, I think; $16.94 is the way I remember it" (574).

He further said that this statement included not only the regular expenses of the Detroit exchange, but its proportion of the general expenses of the Michigan Telephone Company (575).

This testimony was duly objected to on the ground that the writing itself was not produced or its absence accounted for (574).

If this testimony is to be relied upon, it shows that the Michigan Telephone Company, with a plant corresponding in every essential particular with that of the Detroit Telephone Company and doing the same kind of business for the same people in the same city, was operated at about one-half the expense per subscriber of the latter company. A few days after this testimony was given Harry J. Boothe, an employé of the auditor's office of the Michigan Telephone Company, found a letter-press copy of the statement in question in a book kept by Akin, in which Akin was in the habit of copying papers and memoranda which would not be copied in the ordinary letter books, and which was labeled "Statistics" (1042). Proper proof was offered that the original paper which had been given to Mr. Forbes, the president of the company, for his information, could not be found (1043, 1049, 1050). A copy of the statement as it appeared in the book called "Statistics" was then offered; whereupon it appeared that Akin's estimate was in two parts, one for the five months from August to December, 1896, and the other for the five months from January to May, 1897; that the average ex-

pense for the five months in 1896 was $20.48, and the average for the five months in 1897, $16.95—within one cent of the figure given by Akin in his testimony (1044). Adding these two sums together and adding one-fifth to get the *yearly average, it amounts to a trifle less than $45.* There is no evidence that this statement includes any allowance for depreciation, and if a reasonable amount be added on that account we will find that the expense of operating such a plant as the Michigan Telephone Company maintains in Detroit, where the subscribers are at an average distance that does not exceed a quarter of a mile (1015) from the exchange, is more per telephone than the highest amount allowed by the act in controversy in this case in this District. These figures, it will be observed, allow nothing for compensation or profit to the Detroit Company.

If the evidence as to this memorandum referred to by Akin is to be considered at all, we ask the court to read at length the testimony on this subject of Harry J. Boothe (1042), John James Boothe (1048), and F. A. Forbes (1049). It will be seen that Harry J. Boothe upon finding the memorandum went to Akin's office, accompanied by one of the counsel for the appellant, and exhibited it to him and asked for an explanation, and that Akin said that "He thought this was the statement he had testified to; that it would make no difference what period was taken if an average was arrived at; it would be the average for the year!" (1047). Although Akin was in Detroit when this evidence was given, he was not called to contradict it.

It will be seen further that the identical book showing the compiled statements of the expenses of the various exchanges controlled by the Michigan Telephone Company, from which this memorandum of Akin's had been prepared, was produced and the entries therein relating to the Detroit exchange exhibited to counsel for the complainants, and that the witness Harry J. Boothe indicated on this statement in the book the pencil marks made by Akin in the different

columns of figures to indicate the period for which he was making his computation (1046). At the request of counsel for the complainants Boothe pointed out to them on the book in question the statement of the Detroit exchange for 1896, where the total general expenses were arranged under proper heads (1046, 1047). Boothe further testified that he had himself gone over the same columns of the same statement and taken the figures for the last five months of 1896 and the first five months of 1897, and found the average expense for those periods per telephone to be, respectively, $21.55 and $18.13 (1044). Taking the aggregate of these amounts and adding one-fifth to get the yearly expense and the result is $47.61.

Beamer, who for eighteen years was in the employ of the Michigan Telephone Company, first as a lineman and last as superintendent of construction, states that the reason the company overloaded its poles, as described in the evidence (1077), was that it did not have any money to do it any other way (1018). It is quite apparent that when the Michigan Telephone Company reduced its rates in Detroit to $36 for business and $24 for residence telephones (451) it did not do it because it could render service at those rates at a profit.

GRAND RAPIDS.

In February, 1899, the subscribers to the exchange of the Michigan Telephone Company at Grand Rapids numbered about 1,300, the average distance of these subscribers from the exchange being about one-half a mile (1034). Most of the plant was overhead, of cheap construction (1017, 1032). Steel wire was used mainly, with common return (1033). The poles were overloaded with wires (Crenshaw, 1089).

From Ware's testimony as to the number of subscribers and the number of miles of wire of the Citizens' Company in Detroit, it is seen that the average distance of those subscribers does not exceed half a mile (494).

The independent company's plant, like that of the Michigan Company at Grand Rapids, is entirely overhead (480). It had 2,525 subscribers and its plant cost $169,000, or about $67 per telephone. It used steel wire, and Ware wished it had gone to the extravagance of purchasing iron wire instead (481). In its lines of cheap poles were to be found many in which the length had been eked out by splicing two poles together (1075). The average price of its poles would not exceed $3.50 (488).

As to the kind of service furnished in Grand Rapids, Boyce, who was induced to leave the service of the Michigan Telephone Company, in Detroit, where he received a salary of $135 a month, gives us an insight into the inefficient service of the Grand Rapids Company under Ware (513, 514); yet he tells us that the service of the independent company at Grand Rapids was better than that furnished by the rival company at the same place (513); and, with all his improvements, he is compelled to say of his own switch-board: "We have got it so that it is working well, but it is not a first-class equipment; there is no getting around that" (513).

FORT WAYNE.

The independent company at Fort Wayne—known as the Home Telephone Company—had, in December, 1898, some 1,624 subscribers (799). According to its books, its plant had cost $247,748.33 (803)—that is, over $150 per telephone. The average distance of the subscribers cannot exceed three-fourths of a mile, as that is the average distance of the subscribers of the other company at the same place (1060). It has two miles of conduit averaging four ducts to the mile. It has, therefore, eight miles of duct, as against 132 miles in the Washington plant (798). Although it is thus almost entirely an overhead plant, its extent is so small, compared with that of Washington, which has two-thirds of its wire mileage underground (185), that it has only 1,200 poles (799)

as against 2,300 in the District (198). One-half of its subscribers have iron-wire circuits; the other half have the common return system (807). It has about 35-foot poles, and the total cost of the poles per mile, with the cross-arms attached, is about $90, or less than $2.60 a pole (824). The wires are about 18 feet from the ground (825). The manholes used in connection with this company's underground conduits are very small, resembling a small sewer-trap (1076). There is no means to either lock the manholes or keep out the street drainage. The covers on these manholes cost about $3 apiece, as opposed to an average of $35 in Washington (1076). It passes comprehension how such a plant as this could have been made to cost $150 per telephone.

The Citizens' Telephone Company, which controls the other exchange at Fort Wayne, has only about 800 subscribers, whose average distance is about three-fourths of a mile, and its plant is entirely an overhead one (1060). Most of its service is evidently iron wire and grounded circuits, because it charges nearly three times as much for a copper wire circuit and a solid-back equipment as for its regular service (1060, 1061). Even in this small exchange the appellees would have to pay for metallic-circuit service such as they have been receiving in Washington $60 a year without their "desk cabinet."

All we know as to the expenses of the Home Telephone Company at Fort Wayne is the showing made by certain papers made up from their books (802 to 805). According to these papers, this company's receipts for a year (apparently the year ending September 30, 1898) were $32,674.92; its operating expenses, $17,846.85, and its net earnings, $14,828 07 (802). As it had during that year about 1,600 subscribers (799), this would make its expenses a little over $11 per telephone. Thorwald puts it at about $12 (807).

The entire worthlessness of these statements is apparent on their face. They show that during the year in question the company spent in new construction a little over $50,000

(831). Cross-examination showed, according to the statements in question, that the company at the beginning of the year had on hand $4,583.83; that there was left of its earnings that year, after paying expenses, dividends, and interest, $4,034.53, the total of these two sums being $8,618.13. There was to be deducted from this aggregate the sum which the statements showed the company had on hand at the end of the year—$3,699.84—the remainder being $4,918.52. They further showed that the only other source of income during the year was the sale of stock, from which was realized either $25,000 or $30,000. This left a discrepancy of from $15,000 to $20,000, which the witness who produced the statements confessed he was unable to explain (834, 835), and no explanation has been offered to this day.

These statements show that the cost of this company's plant was $247,748.33 (803–831), or considerably over $154 per telephone. When it is remembered that this plant is almost entirely overhead construction of the cheapest possible kind (798, 825, 1076), and that the average distance of subscribers is not over three-fourths of a mile, it is apparent that this evidence goes far to show that the estimated cost of replacing the appellant's plant in this District—$210 per telephone—is reasonable.

Although the testimony of the officers of this company was taken in its own office in Fort Wayne, its books were inaccessible (808). It did appear, however, that neither its president, vice-president, or treasurer received any salary, and that its secretary served for $50 per month (817). It further appeared that a large part of its customers were compelled to use the common return system, and that this service was put off on the residence subscribers because it is cheaper and residences were supposed not to require as good service as business stations (826). So, says Thorwald, "when we have trouble with the common return and we cannot get rid of that we change them into the other" (825). In its book-keeping this company made no allowance for

depreciation (831), and the 10 per cent. allowance on that account upon its alleged $247,000 worth of plant would more than absorb all its supposed net earnings without any provision for payment of interest on its bonds or dividends on its stock.

Another subject of remark with this company, which applies to perhaps all the companies in the smaller towns, as to which the complainants have taken testimony in this case, is that 90 per cent. of its stockholders are among the prominent business men of the city in which it maintains its plant (829). It is obvious that however unsatisfactory the service of such a company may be as compared with that of a rival company which is controlled by non-residents, through its stockholders and their friends and connections, it is sure of doing a fair business, and for the same reason men are found who are willing for a time at least to serve as officers of the company on small salaries or without any compensation at all. Manifestly these are features which must be eliminated on considering the cost of running a telephone exchange in a large city on a permanent basis.

The Central Telephone Company, which controls the other exchange at Fort Wayne, owns about 250 exchanges in the States of Ohio, Indiana, and Illinois (1060). Manifestly under such circumstances a few of these numerous exchanges may be operated at a loss without materially affecting the profit and loss account of the company as a whole. Taylor, the manager of this exchange, testified that the books of account were kept at the main office, in Chicago; that the rates at which he was doing business are not profitable, and that he had no personal knowledge why the officers at Chicago fixed unremunerative rates at Fort Wayne "further than as a measure of necessity to protect our interests here" (1061).

RICHMOND.

The Richmond Telephone Company, in March, 1899, had about 1,300 subscribers (863). Its original plant, with 1,200 subscribers, was constructed by a contractor who was paid at the rate of $75 in bonds for each telephone up to 1,200 (865). Robertson, the president of the company, at the time he gave his testimony, thought the entire plant could be duplicated for $75 a telephone. The average distance of the subscribers in this exchange does not appear, but from Robertson's testimony as to the proportion of the telephones in the business district and the boundaries of the business district it would seem that the average distance would not be more than three-fourths of a mile, and probably not over one-half of a mile (880, 887). It is entirely an overhead plant. It has a few cables on its poles, containing copper wire, but the bulk of the wire is steel (878). Within what is called the business section, which does not comprise such built-up localities as that where the Jefferson hotel was situated, 60-foot poles are required, and everywhere else small poles are used, which cost from $1 to $1.50 apiece (879, 880, 881).

The regulations of the authorities in Richmond require the wires to be only 25 feet from the ground (895)—just one-half the height required in Washington. The steel wire used in this plant costs from 3¼ to 3½ cents per pound (881).

Robertson's experience with first-class telephone plants is well illustrated by his remark that he does not "think any company uses copper wire, except in cables" (898). If any further evidence is needed to show that the cost of this plant at Richmond is no criterion as to the cost of such a plant as is required in Washington, it will be found in Crenshaw's detailed description of the pole lines of the Richmond company (1078, 1079).

And, even with such a plant, many of this Richmond

company's subscribers paid from $42 to $72 per annum for their telephones (902).

Although Mr. Robertson says he is no book-keeper (883), it is he who is called upon to testify as to the receipts and expenses of his company. He stated that the receipts of the Richmond Telephone Company are about $32 per telephone per annum, and its operating expenses $23.61 per telephone (869). He explains in the first place that the $32 is what the 'phones would average if the money was all collected (870). He further explains that it is hard for his company to keep its construction account separated from maintenance; that they mix the two accounts together, and that it was not necessary for them to be exact in this matter for the reason given by him that their bonds are held by their largest stockholder (871). Notwithstanding his statement that the net receipts for their telephones are about $8.40 each—an apparent profit of $10,920 a year—he still says, "We have not made any money" (868). This statement is corroborated by the fact that the company is in arrears in paying interest on its bonds (873), and by the further fact that in consequence of a certain storm, which did damage to the plant to the extent of between $600 and $1,000, the company had got behind in paying its operators (888). The company keeps no depreciation account, laying nothing aside for the evil day when its entire plant will have to be rebuilt because of decay or abandoned for construction of greater capacity (884). As the cost of this plant seems to have been in the neighborhood of $100,000, 10 per cent. per annum allowance for depreciation would of itself absorb nearly the whole of its supposed profits.

This is the company of which Duvall testified in Chicago that its cost of maintenance as distinguished from its operating and other expenses was one dollar per telephone per year (604). (Crandall's testimony is that the cost of proper inspection alone in Washington amounts to ten or twelve dollars per telephone per annum, and that one dollar per

annum would not pay one-fourth of the cost of merely changing the liquid in the batteries at the subscribers' stations) (1106). When Robertson, on cross-examination, was asked what is the cost of maintenance per telephone per year in Richmond, he replied, "We have never separated that. We have just simply put that in with the general expenses. It is hard to find out, because the men who are on regular salaries do the work, and it shows there how much material we buy for the year; but it would be hard to separate the cost of maintenance from the actual expense (894)." He further tells us that his company has no regular system of inspection; that their custom is when a complaint is made to send out an inspector to find out what is the matter (894). Robertson, however, had testified that his company had a chief inspector at $600 a year and from four to six other inspectors at $480 a year (867). Allowing for one chief inspector at $600 and five assistants at $480, the aggregate is $3,000, or about $2.30 for each of the 1,300 telephones for this one item of maintenance. Perhaps we are giving to Duvall more attention than he deserves, but such inconsistencies as this illustrate the value of most of the testimony as to operating expenses in other cities submitted by the complainants in this case.

The books of this Richmond Company in the main were kept by a young man who had not graduated in book-keeping or had much experience (899). Maupin, who was regularly employed as a book-keeper elsewhere, "comes up once or twice a week in the evening and writes the books up" (875). Maupin was examined as a witness for the complainants, and after some trouble was induced to produce the company's ledger. Thereupon a long cross-examination took place in an endeavor to ascertain whether labor and materials which should have been charged to maintenance had not in fact been charged to construction (905 to 912). Finally the witness said that the only person who could give this information was McClure, the general manager

(914). After Maupin had finished Robertson was recalled, and after another long examination of Robertson (917 to 919) in a vain effort to find whether the wages of the construction gang, when engaged in making repairs, were not charged to construction instead of to maintenance, Robertson left the room, and upon his return he stated that after consultation with McClure he had learned "that the construction gang for the latter half of February should have been charged to maintenance" (919). But counsel industriously refrained from putting on the stand McClure himself, the only witness who could give the facts as to this important matter.

Without going further into the details of the financial affairs of this Richmond Company we think we may safely say that not only has it never paid a dividend (868), but that as it is at present managed it never will.

NORFOLK.

In March, 1899, the Southern States Telephone Company had at its exchange at Norfolk, of which the witness Pannill was superintendent, 1,300 subscribers, divided between the three exchanges in Norfolk, Portsmouth, and Berkeley (924). The Norfolk exchange was the principal one, there being there 1,100 subscribers, whose average distance from the exchange was about one-eighth of a mile (926–929). The average distance in Portsmouth was one-sixteenth of a mile and in Berkeley one-half of a mile. The diminutive size of the Norfolk plant is further apparent from the fact that, though it is entirely an overhead plant, it has only 542 poles (928). Most of these poles are from 25 to 50 feet in length and carry an average of eight cross-arms (927, 933). The whole plant, which had been in existence about two and a half years, would last only about six years longer (1079).

We are at a loss to know how counsel can reasonably expect the court to give any consideration in this case to

the evidence relating to the cost of operating this Norfolk exchange. The area supplied by the exchange in Washington is about 250 times greater than that supplied by the Norfolk exchange. Yet even the Norfolk company, with its rates of $30 for business and $25 for residences (925), has never been able to pay a dividend (942). It has stopped seeking new subscribers because at those rates it cannot make money (929, 935, 937 to 942). What kind of service it gives its subscribers may be inferred from the fact that its superintendent Pannill, says that the defects in the switch-board which it got from Keelyn's company have been corrected "so far as possible in this board" (936), and from the further fact, also testified to by Pannill, that those of its subscribers who had occasion to frequently communicate with each other asked to be placed on the same division in the switch-board to avoid the delays and mistakes which otherwise ensued (930, 931).

The book-keeper of this Norfolk company, from whom, directly or indirectly, comes the evidence as to its receipts and expenses, after testifying that the company had borrowed nearly $10,000 during the year last past and had sold $50,000 par value of its stock during the same period, said he could not tell how much money was received for the stock, because that account was kept by the treasurer in Baltimore (948). It would seem from this that the head-office expenses of the Southern States Telephone Company chargeable to Norfolk had not been taken into account at all. Moreover, the company keeps no depreciation account or anything in the nature of a reserve set aside for depreciation (949). The cost of the plant of the Norfolk company is nowhere given, but as the difference between its ostensible receipts and expenses per annum, as given by Bonney, its book-keeper, is only about $3,000 (947), it is obvious that this difference would not meet any proper allowance for depreciation alone. If we assume the cost of the plant to have been the same as that of the Richmond Telephone Company, approximately $75 per tele-

phone, then, since it has about 1,300 subscribers (924), the cost of the plant would be in the neighborhood of $100,000. The proper allowance for depreciation would be at least $10,000, and the company, on the showing of its own books, is losing about $7,000 a year.

CANADIAN CITIES.

In Toronto, Montreal, and Quebec the construction is of the cheapest kind. In Quebec the plant is entirely overhead, and in Toronto and Montreal the greater part of the plants are overhead also (957, 983, 984). Iron wire and Blake transmitters are universally used, except in a few instances where the solid-back telephone, with complete copper-wire circuit, is furnished at a much higher rate than that charged for the ordinary equipment (965, 966, 967, 984). In Toronto, for instance, the poles used are only from 33 to 55 feet in length (957). Some of these diminutive poles carry not less than 12 or 13 cross-arms, with 20 wires on each cross-arm (959). The wire used in Canada costs $5.80 per mile as opposed to $20 per mile, the cost of the great bulk of the wire in Washington (962). The average distance of the subscribers' stations in Toronto and Montreal is not given. That it is much less than in Washington is shown by the fact that, while one-third of the wire mileage in Toronto is under ground, there are but five miles of conduit there (957) as against fifteen miles in Washington (191). In Quebec the average distance is four-fifths of a mile (986).

McFarlane's description of the Quebec plant will answer very well for the Canadian exchanges generally. He says:

"It was entirely overhead, iron wire, single-grounded circuits, on cedar poles, eight-pin cross-arms, wires above and below the cross-arm, so that there were 14 subscribers' lines on each eight-pin arm, in most parts of the city, cabled with single wire" (983). "Entirely Blake transmitter" (984).

The complainants examined two witnesses on the subject of telephone rates in Toronto. One of them, Holmes, testified entirely from hearsay that a telephone company called the Bell Company operated in a number of cities in Canada, including Toronto; that its rates in that city were for business $45, and for residence $25 per year, and that the stock of that company was quoted at about 170 and its 5 per cent. bonds at about 110 (455, 456). Fleming, an ex-mayor of Toronto, gave similar testimony as to the rates charged in Toronto and as to the market value of the Canadian company's stock (535–537). We must conclude that complainants' counsel conceived this evidence to tend to show what were the expenses of carrying on the telephone exchange in Toronto. That it is competent evidence for that purpose or that it is competent evidence in this case for any purpose we deny. Nevertheless, on behalf of the defendant, the depositions of McFarlane, the manager of the eastern department of the Bell Telephone Company of Canada, and of Sclater, its secretary-treasurer, under whose supervision and direction the books of that company for many years have been kept, were taken (955–999). The direct examination of these witnesses was confined almost exclusively to the financial transactions and condition of the Toronto exchange. On their cross-examination, however, counsel for the complainants made them witnesses for the complainants on a variety of matters not touched by the direct examination.

In Toronto the annual rate for instruments and equipment like those used by the appellees and involved in this case is $70 (975). From the testimony of McFarlane, general superintendent, and Sclater, secretary-treasurer, of the Bell Company of Canada (corroborated by Higman, who was detailed by the Government to examine the company's books and determine whether its representations that it was doing business at a loss in Toronto and in other cities were correct (see pages 987 to 995), it was demonstrated that even with such a plant and with such a service as existed in

Toronto the telephone exchange could not be carried on at a profit at the rates in force there, and that for that very reason the Canadian company was petitioning the Canadian parliament for liberty to increase its rates (976, 997 to 1002, 988). It will be perceived that, so far as the evidence discloses, even in Canada there never was any limit on the rate which might be charged for such equipment and service as the complainants in this case receive from the defendant.

In their brief, counsel for the appellees, with a facility which is not uncommon among those who manage vast enterprises equipped only with a pencil and writing pad, figure that in fact the telephone business at Toronto was done at a profit. This they accomplish by the simple method of eliminating entirely a single item—that of depreciation—which cost the Toronto exchange an annual sum varying from over $4,000 in 1881 to over $70,000 in 1894. That is to say, the books of the Canadian company show that from 1881 to 1895 there was actually spent in the construction and maintenance of the Toronto exchange the sum of $1,049,372.45, and that at the end of that period the plant was worth only $684,232 (1001, 1003). The difference, $365,140.45, to quote from the brief for the appellees in the court below, "had disappeared from the face of the earth." Counsel for the appellees, disregarding this evidence, assume that in the future the Toronto exchange will lose nothing by depreciation; that its plant will last forever; and that no improvements in the telephone business will at any time require it to cast aside any of its apparatus.

As to the market rate of the stock of the Canadian company, it turns out that that company controls 343 telephone exchanges and 340 toll stations scattered over Canada from New Brunswick on the east to the Rocky mountains on the west (956). Certainly the mere fact that a company operating so many different exchanges and such a large long-distance business in addition made a profit on its entire operations throws no light whatever upon the question of the cost of

the business in any particular city. Even if this were a correct showing we are at a loss to know what effect it could have in this case. The undisputed evidence shows that every man who is employed by the defendant company, whether he is paid a salary or works for daily wages, earns all that he gets. If there should be such a difference as counsel here indicate, it would simply show either that the wages are lower in Canada, or that the service is less efficient, or that, owing to shorter average distance of the subscribers from the exchange in Toronto, a smaller force is required than in Washington. But in fact on this point counsel for the complainants have not been entirely candid. They know perfectly well that in the distribution of labor in the Canadian company a very large part of the expense properly chargeable to the Toronto exchange is incurred at the headquarters of the company in Montreal or at the headquarters at Hamilton of the department in which Toronto is situated (976, 977, 979, 996, 1008). McFarlane testifies that the head-office expenses alone amount to $7 per annum per subscriber for the whole system (977). He also gives a list of the salaried officers at Hamilton, amounting to $12,516 per annum, one-third of which, $4,172, is chargeable to Toronto (977).

The pay of the clerks in the head office at Montreal is not given, but some indication of the difference between Toronto and Washington in respect of the act now under consideration may be gathered from the fact that at Hamilton six clerks at department headquarters work for an aggregate compensation of $2,460 per annum, a trifle over $400 a year for each clerk, while in the auditor's office in Washington the clerks receive from $520 to $900 each (72). So at Hamilton three "repairers" each receive $222 per annum for their work (977). The lowest wages paid to any skilled workman by the defendant is $624 per annum (74). We do not now understand that even counsel for the complainants contend that the defendant company should reduce to the Canadian scale the wages of its clerks and linemen.

Higman, who was employed by the Canadian authorities to investigate the telephone business in Canada, reported as the experience of the exchanges in Canada—

"That the cost of construction of an underground metallic or double-wire system is 300 per cent. greater than a single-wire overhead system, and that the cost of operating the former is at least 30 per cent. greater than the cost of operating the latter, even without making allowance for the destruction of underground cables by electrolysis" (989).

The rate for grounded-circuit service in Toronto ranged from $25 to $45 and for metallic-circuit service was $70 per annum, with an extra charge in all cases for stations more than one mile from the central office (957–975–980).

Attention is invited to Table A in Tompkins' report, showing the rates for various kinds of service in the principal cities of the United States (64). It is here reproduced to show graphically that rates vary with the size of the city, and also to show the prevailing rates in cities of the class to which Washington belongs, so far as population is concerned.

Population, census 1890.	Cities.	Business.			Residences.		
		Metallic circuit.		Grounded circuit.	Metallic circuit.		Grounded circuit.
		Special.	Two-party.	Special.	Special.	Two-party.	Special.
1,515,301	New York *	240	150	150	180	125	100
1,099,850	Chicago	175	None.	125	125	None.	100
1,046,964	Philadelphia *	160	None.	120	130	None.	100
451,770	St. Louis	None.	None.	100	None.	None.	60 to 100
448,477	Boston *	156	135	120	110	96	96
434,439	Baltimore	125	100	78	100	80	78
296,908	Cincinnati	125	100	100	100	80	72
261,353	Cleveland	120	100	72	100	80	60
255,664	Buffalo	All measured service.					
242,039	New Orleans	None.	None.	96	None.	None.	55
204,468	Milwaukee *	120	100	72	70	60	50
164,738	Minneapolis	120	100	72	100	80	60
133,896	Rochester	94	None.	64	75	None.	60
133,156	St. Paul	120	100	72	100	80	60
132,146	Providence	120	None.	60	120	None.	60
106,713	Denver	120	100	80	90	72	72
	Montreal	None.	None.	50			

* These cities have measured service also, *i. e.*, a fixed rate for a certain number of messages and an additional charge for each message over this number.

Buffalo has measured service only. The report of the committee of the city council gives the average cost to subscribers in 1884 as being $110 per annum.

In Montreal the company pays no royalty, taxes are very light, and expenses, as shown by their statement, are about 60 per cent. of those in Baltimore.

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TELEPHONE EXCHANGES IN EUROPE.

There is in the record considerable evidence, nearly all of which is hearsay, as to telephone rates and service in various cities in Europe. The principal question of fact involved in this case is what are the reasonable and necessary expenses in operating a telephone exchange in the city of Washington, to serve subscribers throughout the District, and evidence as to what is charged for such service in foreign cities, therefore, is wholly irrelevant. When we look at this evidence as to rates in Europe we find remarkable diversity in the charges in the different cities, and as a rule that they vary with the size of the city. The cost of labor, rent, transportation, and various other items entering into the total cost of rendering telephone service is much less in Europe than in this country (1125). Nevertheless, it will be observed that for an inferior service the European rates in many cities are far higher than the statutory rates fixed for the District of Columbia.

In London the standard rate for metallic-circuit service is $100, subject to an additional charge for subscribers at a distance from the exchange; and this notwithstanding the fact that London has mainly an overhead plant, and the service is of an inferior type (1142). In other cities in Great Britain the rate is $50, the plant being overhead and grounded-circuit service only being furnished (1143). In England the compensation of employés is from one-third to one-half what it is in this country (1143). In Paris the rate is $80, the subscriber buying his own station apparatus, and in some cases contributing to the cost of the line (1143). The government operates the telephone system and there has the use, free of charge, of the city sewers for its cables (1126, 1143).

The rates in Switzerland are partly by subscription and partly toll, the subscription ranging from $20 for the first year to $8 for the third and subsequent years, and the toll

being levied on every separate talk or conversation (1127). To a subscriber in Switzerland making as many calls per year as the appellees in this case (82) the rate, even at a charge of one cent per separate talk or conversation, during the first year would be $95 and during the third year $83. The business is conducted at a loss (1139).

In Stockholm there are two systems, one operated by the State and the other by a private company. The rate for unlimited use is $27.50, but, in addition to this, there are other charges, among them one of 2.7 cents for each message from a telephone in the private company's system to a telephone in the Government system (1137). As a result of the tremendous competition, although the private company paid a dividend on a small proportion of its capital (1148), both systems are worked at a loss (1126–'7).

In Vienna the rate is $40 per year for grounded-circuit service and the system is operated by the government (1144).

In Germany the system is also in the hands of the government. The rate is uniformly $37.50 per annum, and the service is carried on at a loss (1143). It is entirely on the single wire or grounded-circuit system, and the telephone offices, even in Berlin, are open only between 7 a. m. and 10 p. m. (1125, 1127, 1144).

In the continental cities referred to, the compensation of telephone employés is often less than it is in England, and the material used in furnishing telephone service in those countries is cheaper than in the United States (1144–1145). Everywhere throughout Europe the service is of an inferior character and inefficient (1145). The evidence does not show the average distance of subscribers from the exchange in any of these European cities, but it is well known that each of the cities referred to is densely populated, with a well-defined business district and a congested center. As regards the government systems, it is generally admitted that they are not run at a profit (1142–1139).

The worthlessness of such evidence seems clear enough;

but, fairly considered, it only strengthens the contention that telephone service cannot be rendered in the District of Columbia at the rates fixed by the statute without loss. The purchasing power of money, the amounts paid to employés, the freedom from charges for rights of way, the use of property, public and private, without compensation; the density of population; whether or not the operations are carried on with a view to making the service pay its own way, and, if so, whether or not any profits are realized, should all be taken into consideration; but we submit that whatever rates may be charged in these foreign cities, and whatever service may be furnished, they cannot properly be considered in this case.

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vs.

J. FORREST MANNING AND HARRY E. RUPPRECHT, TRADING AS J. F. MANNING AND COMPANY, APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT; ALSO COPY OF APPELLANT'S CHARTER.

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SUPPLEMENTAL BRIEF FOR APPELLANT.

Since our principal brief was in type we have received a copy of the brief for the appellees in this court, which contains so many inaccuracies, and in several respects such mistakes as to the evidence, that in justice to the court, as well as to our client, we are constrained to call attention to some of these errors.

On pages 12 to 14 of their brief counsel give what is headed "History of Washington Plant." In fact, all that is attempted to be set forth under this head is a statement of what is alleged to have taken place when the ap-

pellant company was organized, in 1883, and here the financial transactions of the company in Maryland and in the District are mixed together in the most confused way. Besides, counsel, near the foot of page 13, add $300,000 to $77,334.93 and make the total $345,045.24.

Since the question of the validity of the act of Congress of June 30, 1898, must be determined by the situation existing at that time, and since the computations on pages 121 and 122 of our principal brief are based upon the actual value at that time of the appellant's property employed in the telephone exchange business in the District, it is difficult to see what bearing the relation between the appellant's stock apportioned to Washington and the assets which it received for that stock in 1883 have upon the case; but if the situation at that time is to be considered, then the only figures which relate to it are those showing what the appellant received when it began business in August, 1883, for the $750,000 of its stock which was issued for the property of its predecessor in the District. That consideration was as follows (71):

Net cash assets	$77,334.93
Value of corporeal plant in the District turned over to the appellant	91,130.21
Value of incorporeal property	581,534.86
Total	$750,000.00

On page 14 counsel, after stating the cost of the Washington plant to be $541,254.12, make a statement which conveys the impression that nearly all of this sum has been paid out of the earnings of the appellant. The exhibit on page 71 of the record shows that the amount contributed to construction in the District out of the earnings of the appellant down to December 31, 1897, was $215,146.01. This amounted to about $15,000 per year for each of the fourteen

years from 1883 to 1897. The dividends paid by the company from 1883 to 1895 averaged 2.99 per cent. on its capital stock (49), and from 1892 to 1897 they averaged 2.583 per cent. (1165). If the $15,000 per annum had been applied to dividends instead of to construction, the total dividends would have been about 5 per cent.

On page 16 counsel, after stating correctly that the annual charge to maintenance from 1892 to 1897 was $53,765, proceed to assume that this would be a fair average for the fifteen and one-half years of the company's existence prior to December 31, 1898, and on this basis proceed with their calculation.

The number of exchange stations in Washington in 1883 does not appear. From 1884 to 1891, being the years prior to those covered by the Haskins tables, the number ran from 954 in 1884 to 1,678 in 1891 (165), the average being about 1,300, as opposed to an average of $1,823.5 during the six years in question. It is manifestly unfair to assume that the expense for maintenance with an exchange of 1,300 subscribers would have been the same as with one of over 1,800.

On the same page counsel make a statement, in support of which they refer to Haskins' testimony, concerning the proceeds of the $400,000 of bonds sold in 1891, which, we think, is not justified by his evidence. What he says on the subject is as follows (367):

"Q. Upon what theory, Mr. Haskins, did you in this Exhibit 'E' under the head of 'Disbursements,' adopt two-fifths of fixed charges, and of the sinking fund, as chargeable to Washington? A. That is a proportion which I arrived at when I made up the original statement, by taking the total cost of construction in Maryland and the total cost of construction in the District of Columbia, and I found that the

proportion of total cost was about two-fifths for the District of Columbia.

"Q. Of original cost. A. The cost of construction at the time I made the proportion.

"Q. Then you adopted for that reason this proportion of two-fifths? A. Yes, sir, it is an estimate.

"Q. Is there anything on the books to show what part of the proceeds of the bonds mentioned in these two items was used in the city of Washington? A. No, sir.

"Q. Then, is there anything to show that any of it was used in the District of Columbia? A. There is no separation of the account as between the Maryland district and the District of Columbia district. The proceeds were used for the general purposes of the company.

"Q. How did you arrive at that conclusion, Mr. Haskins? A. Well, the accounts will show.

"Q. Show what the bonds were used for? A. Yes, sir; used for the treasury of the company.

"Q. For the general treasury? A. Yes, sir.

"Q. Do the accounts show any specific use to which these proceeds were put? A. They paid off the indebtedness of the company.

"Q. What indebtedness? A. There was considerable indebtedness at the time the bonds were issued—borrowed money."

Tompkins' statement (49) cannot be considered to mean that the entire proceeds of these bonds were used in Baltimore. After referring to certain expenditures for construction in Baltimore, his only statement on this point is: "To meet this outlay, the company was obliged to issue bonds to the amount of $400,000.00." Therefore, it is clear that the proceeds of the bonds went into the general treasury and were used in paying debts. The presumption is that the directors used the proceeds of the bonds for the purposes for which they were issued. That the debts paid were construction debts is clear from the fact that the earnings, as shown by the Haskins statements, exceeded the operating expenses, fixed charges, and dividends during all of the years under consideration. It nowhere appears in the record that

the company had any debts, except for construction purposes, which the proceeds of these bonds could have been used to defray. The necessary and justifiable conclusion, therefore, is that the proceeds of the bonds were used to pay debts incurred in constructing the plant in the District of Columbia as well as in Maryland. The apportionment of the bonded debt to the District was based upon the value of the property as it stood at the time, as shown by Haskins' testimony above quoted.

This whole question of sources from which construction funds were obtained seems to us to be irrelevant, but the facts are stated for the sake of clearness.

On pages 16 and 17 of their brief, counsel say that the average number of telephones in use during the first nine months of 1898 was 2,126, "of which some are private lines so called." As in Haskins' statement for that year the expense per telephone is arrived at by dividing the exchange expenses by 2,126, the court would infer from this statement that Haskins included the private lines in his calculations. In fact the 2,126 telephones were all exchange telephones. It will be seen by Exhibit C, on page 348, that Haskins states the "total *exchange* station income" for the nine months at $156,560.71, and then adds the private line rentals to get at the "total receipts." So on page 349 he begins his calculation with "total receipts from *exchange* stations" $156,3[5]60.71.

The number of exchange stations in each year from 1884 to 1898 is shown on pages 165 and 166, where it will be seen that the exchange stations in January, 1898, were 2,106. On page 350, in parallel columns, is given the number of exchange stations and private lines for each of nearly forty dates during the nine months of 1898 in question, showing that during that time the average number of exchange telephones was 2,126, and of private line telephones 484.

On page 19 of the appellees' brief it is said that there is nothing in local conditions in Washington to cause more cost for underground construction than in other cities, and the testimony of Bryan and Crenshaw on that subject is referred to. It will be seen from that testimony that they simply stated that the cost per lineal foot of the trench and conduit is somewhat less than in some other cities (157, 189). Their testimony in nowise contradicts (what counsel in other parts of their brief practically admit) that the extent of the underground construction necessarily required is much larger in Washington than in any other city, and that the replacing of the asphalt pavement is an expense here not incurred in the other cities to which the evidence relates.

As to the larger area served by the Washington exchange, counsel say, on page 21 of their brief, that the average distance of the subscribers is 1½ miles. On page 22 they say it is two miles. In fact, it is $1\frac{9}{16}$ miles (1069).

On page 20 counsel state that the six years ending in 1897 were years "of the heaviest construction and reconstruction." On pages 69 and 71 of the record is a table showing the amounts spent for construction each year from August 1, 1883, to December 31, 1897, from which it appears that while the total amount spent for construction during that period was over $440,000, the amount so spent during the six years in question was about $150,000. The average amount per annum during these six years was about $5,000 less than the average expense for each year during the entire period from 1883 to 1897.

On page 21 counsel make the remarkable assertion that the reason the average distance of the subscribers from the exchange is greater in Washington than in other cities is because we have fewer telephones in proportion to the popula-

tion; that where the rates are low the average distance is small and where they are high it is great. It seems clear enough that if an increase in subscribers could have any effect at all on the average distance it would slightly increase it, for the reason that the business houses which ordinarily are the first users of telephones are nearer the heart of the city than the residences which come in later; but in a city like Washington, where both business houses and residences are to be found in all quarters of the city, there could not be any considerable variation in the average distance of the first thousand subscribers, or the second or the third thousand. If, for instance, there were one hundred subscribers scattered along a trunk line running from the exchange to the Navy Yard and another hundred persons should become subscribers along the same line, it would be idle to expect that the average distance of the new subscribers would be any less than that of the first hundred.

Indeed, in an extract from a document which came into the case through the appellees, Professor Abbott, of the University of Wisconsin, says:

"The growth of telephone service is usually centrifugal, the first exchange being located near the centre of the business district of the city around which the residence portion, *at constantly increasing distances*, are located" (796).

Moreover, when the act involved in this case was passed, the appellant, in addition to the ordinary rates for telephone exchange service made a charge where the subscriber was more than a mile from the exchange of $10 a year for each quarter of a mile, or fraction thereof, additional distance (436), which tended to restrict the use of telephones in the outlying parts of the District. The statute fixes the same maximum rate for all subscribers, without reference to distance, the necessary result of which would be to increase the average distance.

On page 26 counsel refer to what they call the enormous expense for maintenance in 1897 of $106,146.60, which they contrast with the average expense during the preceding five years of $42,289.15. The evidence in this case is clear and satisfactory as to the reason for this increased expense in 1897 over the preceding years covered by Haskins' investigations.

In the first place, it was during the year 1897 that $21,398.35 was expended in replacing a part of the abandoned solid system of conduits (199). There was no charge made on this account in any of the other years in question.

In the next place, for several years prior to 1897 repairs to the overhead plant were impracticable or inadvisable because of legislation of Congress looking to the placing of the overhead wires in the city under ground. By an act of Congress approved August 6, 1890 (26 Stat., 304), the President was authorized to appoint a commission to consider the location, arrangement, and operation of telephone and other electric wires in the District "with a view to securing, as soon as practicable, the construction of a safe and convenient system of conduits or subways, the placing therein of all necessary electric wires along the streets, avenues, and other public spaces, and the removal of all unused overhead wires and their supports."

This board was directed to report not later than December 1, 1891. The commission filed a report accordingly. Afterwards, by an act approved March 3, 1891 (26 Stat., 1073), Congress restricted the powers of the District Commissioners in the granting of permits for conduits "until action by Congress upon the report of the board." This legislation and the acts under it made the Commissioners unwilling to grant permits looking to the renewal of any part of the overhead plant of telephone, telegraph, or electric lighting companies in the District, and made it inadvisable for the companies owning such overhead plants to spend mony in repairing them, when it seemed highly probable that they

would have to be removed and the wires placed under ground in the near future. But on March 3, 1897, another act was passed which will be found on page 203 of the record, which expressly gave to the Commissioners power to grant permits for the extension of overhead electric-wire plants, and it plainly indicated that Congress did not expect to take any action for some time on the report of the commission above referred to. During these six years of waiting the overhead plant of the appellant had necessarily gotten very much out of repair. After the act of March 3, 1897, was passed, the appellant's lines were put in good condition, the work of this character which would have otherwise been spread over several years being done in one. All this fully appears in the testimony of Bryan, who was the president of the appellant during the period in question (279), and of Crenshaw, the superintendent of construction (203).

In various places in their brief counsel intimate that the expense account of 1897 was unduly swelled by charging to maintenance items that should have been charged to construction, and they refer in this connection to the admitted fact that while nothing was charged to new construction of the outside plant during that year, there was, as shown by the annual report of the president for the year, an increase in the extent of the overhead plant (86–87). This, too, is fully explained in the evidence. The report in question shows that in the year 1897 there was an increase of seven hundred and eighty-three poles in the District plant. The uncontradicted testimony shows that of these, 346 were erected for the joint use of the appellant and the American Telephone and Telegraph Company, in the District and outside the city limits, and that the entire cost thereof was borne by the American Company; hence there could be no item in the construction account of appellant to represent

them (379). Wires were run on these poles and paid for by the American Company (380).

One hundred and twenty-two of the poles in question were used in rebuilding an existing pole line belonging to the Postal Telegraph Company, which the Chesapeake and Potomac Telephone Company had the right to use under an agreement requiring it to bear one-half the cost of maintaining the line. It became necessary because of its dilapidated condition to rebuild this line, and the work was done by the appellant, one-half of the total cost being paid by the Postal Company and the other half being charged to maintenance (379). This was entirely proper, because the company merely rebuilt a line which it already had the right to occupy and was occupying, and in accordance with the agreement it bore one-half the cost of the extraordinary maintenance. The Postal Company continues to be the owner of these poles.

The remainder of the poles were either placed in existing lines because of *changes in the routing of wires*, made necessary by the erection of buildings, and represented no actual extension of the plant (380), or were small poles used in running branch lines to reach subscribers residing adjacent to main lines, and were charged to maintenance because of the uncertainty of being able to use them again in case the particular subscribers for whom they were built should give up the service. In fact most of these poles were thrown out of service before the testimony in this case was closed (379).

The placing of certain underground cable was also referred to, as to which the testimony shows that part was used to replace old cable no longer serviceable, part was drawn out of the conduits at one location and drawn in at another, and the rest of it was used in connection with work done to clear the way for the underground construction of the Metropolitan Railway Company, which work was paid for by that company (381). The report also showed that certain aerial cable had been placed. This was used in connection

with rebuilding pole lines to replace open wires removed from the old poles (382).

Certain overhead wires were also placed, but in every case they replaced old wires and *none of the work represented an actual extension of the company's plant* (380).

On pages 31 to 33 counsel submit statements for the years 1892 to 1897, giving an estimate of the expense per telephone during those years, after making certain deductions. Among other things, they deduct for each of the years 1894, 1895, 1896, and 1897 the sum of $28,559.03, or $114,236.12 in all. This they do on the theory that that sum was the cost of replacing the solid system, and that it was all charged to maintenance during those years.

Counsel have made here a gross error, which of itself discredits their entire calculation.

This sum of $114,236.12 *was the cost of the solid system, not the expense of replacing it.*

The original cost was $95,224, which was charged to construction, the remainder being spent in repairs and on branch lines and charged to maintenance (200, 201). All this occurred in 1884 to 1887 (184, 190) and has nothing to do with the expenses in 1892 to 1897.

The only charge that was made to maintenance when the solid system was subsequently abandoned was the charge of $21,398.85, expended in 1897 for replacing *a part* of the solid system (199). The remainder of the solid system was never directly replaced (202), and the only fault that Haskins found with the appellant's book-keeping was that when the part not replaced was abandoned its cost was not charged to maintenance (353, 354).

Here, therefore, is a plain error in the figuring of the counsel for the appellees of the difference between $114,236.12 and $21,398.85. *This difference applied to the four years to*

which the error relates, 1894 *to* 1897, *amounts to twelve dollars and sixty cents per subscriber per annum.*

On page 34 of their brief counsel state that the cost of the appellant's outside plant (in this District) was about $400,000, and that three-fourths of this amount was chargeable to conduits. They than draw the conclusion, which they use in subsequent calculations, that the subscriber should not be charged with the maintenance of more than about $200,000 of this outside plant because it was unnecessarily large. In support of this statement counsel refer to Crenshaw's testimony, on page 107 of the record. What Crenshaw there says is that conduits complete, constructed so as to leave a reasonable proportion of ducts for future growth, would cost nearly three times as much as the cables. It will be perceived that this witness is not speaking of the outside plant as a whole, but simply of the underground plant, and as to that he is referring only to the conduit itself and the cables, excluding the cost of digging the trench and replacing the asphalt pavement where that is required. By reference to the statement prepared by the same witness (383), showing in detail the cost of reproducing the outside plant of the company in the condition in which it stood when the act in question was passed, it will be seen that the total value of the outside plant was $331,524.39, while the conduits, including the manholes, were of the value of $146,920.96, or a little more than two-fifths of the whole, instead of three-fourths, as estimated by counsel.

In this connection it should be borne in mind that, aside from the necessity, in laying conduits, of making reasonable provision for future growth, there must at all times be a considerable proportion of unused wires in any telephone system. The cables used in the conduits are of certain standard sizes—50 pair, 100 pair, 150 pair, &c. If there be 60 subscribers on a certain trunk line, a 100-pair cable must be used. In the aggregate this would greatly increase the cable capacity and in a large measure the duct capacity of

an underground system of conduits. Sargent testifies that in Brooklyn, in December, 1898, not more than 50 per cent. of the underground capacity of the exchange plant was in use (432).

On pages 36 and 37 counsel undertake to correct the Haskins tables by using as a divisor in estimating the average annual expense per telephone the number of exchange stations plus the number of private telephones in use in the District. Aside from the question discussed in our principal brief, page 43, that because private lines are included the act is void, the calculations of counsel are open to two very serious objections. In the first place, the number of private telephones stated by them for the six years from 1892 to 1897, inclusive, is pure guesswork, as there is no evidence in the record as to the number of private telephones in any of those years. In the next place, the evidence shows that it is impossible for the appellant to obtain for private line telephones anything approaching the maximum rates fixed by the statute. The average number of private telephones during the first nine months of 1898 was 484 (350), and the rentals from that source during the same period (348) amounted to $4,912.10, or at the rate of $13.58 per telephone per annum.

Counsel in their computations estimate that the appellant will receive under the statute $50 per annum for all their telephones. This error is serious enough, as to the exchange telephones alone, many of which would necessarily be demanded at the lower rates named for party lines; but for the private lines it is still more unreasonable, because it is obvious that if the rate for them should be raised from an average of $13.58 to $50, the users of most, if not all, of them would give them up, and there would be practically no income at all from them.

It is evidently impossible to arrive at any just conclusion in regard to the cost per telephone of the exchange service by including the comparatively small proportion of receipts

and expenses incident to the private telephone business, because the number of private telephones is out of all proportion to either the receipts or expenses on that account.

Private telephone systems require very little service from the company. After they are installed the user calls for no aid from the company except such as may be required to keep the telephones and connecting wires in working order.

The inclusion of the private telephones in the computations under consideration leads to an error of about 20 per cent. in the average expenses per exchange telephone.

On page 38 counsel criticise Mr. Bryan's statements as to what the appellant's receipts would have been under the act at the time it took effect. They claim that he has omitted certain sources of income, the principal source so omitted being the receipts from the private lines and the local pay stations. As to the latter it does not appear that they have been omitted. They are included in the Haskins tables for the six years from 1892 to 1897 (1166), and for the first nine months of 1898 (348). As to the private lines, we have in our principal brief argued that because they are included the act is void. If they are not included, then under the doctrine laid down by this court in Smyth *vs.* Ames, 169 U. S., 466, 541, receipts from other sources than those to which the act applies cannot be taken into consideration.

On page 60 counsel, for the purpose of making a comparison between Toronto and Washington, to the disadvantage of the latter, make an arbitrary division between the city proper and the remainder of the District of the 2,126 exchange telephones in use in 1898. There is no evidence in the record tending to show what is the proper division. Counsel assume that 75 is the number in the suburbs and 2,050 the number in the city,

including Georgetown. Then, applying Crenshaw's testimony that the average distance in the city, including Georgetown, is only one and one-half miles, they proceed with their calculation. But since the average distance of all the subscribers in the District is one and nine-tenths miles, it follows that if 2,050 of this number average about a mile and a half, the other 75 would average *about ten miles* in order to keep up the grand average of one and nine-tenths miles. Hence the arbitrary division made by counsel must be altogether wrong.

At the end of their brief, on page 71, counsel sum up the whole matter with a table which furnishes a more extraordinary illustration than anything hereinabove referred to of their liability to err in their endeavor to "reform" the clear and satisfactory statements for the years 1892 to 1897, inclusive (1162 to 1167), made by Haskins and confirmed by Tompkins. For convenience, we reproduce the table in question here:

"Annual expense, as per Exhibit D		$128,418.16
" Deduct:		
" Rentals and royalties	$19,822.67	
" Interest on bonds.....	8,000.00	
" Sinking fund	6,666.67	
" Traveling expenses	3,159.80	
" Construction mischarged to expense.....	19,039.35	
" Expense of maintaining excess plant, 2% on $200,000.00	4,000.00	
" Reduction of salaries, $6.00 per telephone	10,941.00	
		71,830.67
" Receipts over expenses.....		$56,687.49"

These deductions we have already dealt with, either in our principal brief or in the supplement. We now simply invite attention to the fact that in this table counsel have undertaken to subtract from the total annual expense certain items which they think are inadmissible, and the remainder they call "receipts over expenses," *thus arriving at the net receipts from a consideration of the expenses alone!*

JOHN W. GRIGGS,
A. S. WORTHINGTON,
Attorneys for Appellant.

Copy of Charter of Chesapeake and Potomac Telephone Company, Omitted from Record in Court of Appeals (19, 132) and Filed Here by Consent of Counsel.

CERTIFICATE OF INCORPORATION OF THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

STATE OF NEW YORK, }
County of New York, } ss:

We, H. P. Frost, H. B. Lytle, M. F. Tyler, H. D. Cooke and A. G. Davis, do hereby certify that we have associated ourselves for the purpose of owning, constructing, using and maintaining lines of electric telegraph, partly within and partly beyond the limits of this State, and of owning an interest in such lines or any grants therefor, and of becoming a body corporate and politic, pursuant to the provisions of an act of the legislature of the State of New York entitled "An act to provide for the incorporation and regulation of telegraph companies," passed April 12, 1848, and the several acts supplemental thereto or amendatory thereof, and we do hereby make, sign, seal and acknowledge this certificate pursuant to said acts, and do certify as follows:

FIRST. The name assumed to distinguish said association and to be used in its dealings, and by which it may sue and be sued, is "The Chesapeake and Potomac Telephone Company."

SECOND. The general route of the line of telegraph of said association will be along all railroads, canals, rivers, bridges, highways, streets, courses and other suitable and conven-

ient ways, from the city of New York, in the county of New York, in this State, to the several cities, villages and towns situated in the State of Maryland and in the District of Columbia, and to, through and from each of the said cities, villages and towns along all railroads, canals, rivers, bridges, highways, streets and other suitable and convenient ways to the others thereof and so as to connect all buildings and edifices, public and private, and places of business, places of recreation or amusement and private dwellings within each of the cities, villages, and towns aforesaid with the route or line of telegraph and telephone communication herein designated; and also connecting each of the foregoing points by telegraphic or telephonic communication with each other, and with all points in the United States of America, and with the lines of telegraph from a point or points in the city of Baltimore, in the State of Maryland, along all railroads, canals, bridges, highways, streets and other suitable and convenient ways and courses leading thence to one or more points in all the cities, towns and townships and convenient localities in each of the counties of the State of Maryland and the District of Columbia, and from one or more points in every of said cities, towns and townships along all railroads, canals, bridges, highways, streets and other suitable and convenient ways and courses to every other point or points therein respectively, and also connecting each of the foregoing points in the State of Maryland and the said District of Columbia by telegraphic and telephonic communication with each other and with all points outside of the counties aforesaid, and with all points in the United States aforesaid, and the points to be connected by the said lines of telegraph are the points above mentioned.

THIRD. The capital stock of said association shall be fifty thousand dollars, which shall be divided into five hundred shares of the par value of one hundred dollars each: *Pro-*

vided, however, That the number of the association may be increased, and the capital stock thereof may be increased from time to time not to exceed fifty thousand shares of five millions of dollars, by a vote of the persons who at the time appear by the books of said association to be the holders of a majority of the shares of the stock thereof, or their representatives, at a meeting of the shareholders called for that purpose upon ten days' written notice thereof deposited in the post-office in the city of Washington, in a postpaid envelope, addressed to each shareholder at his place of residence or business as the same appears upon the transfer books of said association, and upon filing in the office of the county clerk where this certificate is filed, and in the office of the secretary of state, a certificate specifying such number and increase, duly executed, proved or acknowledged by at least a majority of the board of directors of said company.

FOURTH. The names and places of residence of the shareholders of said association, and the number of shares held by each of them respectively, are as follows:

Name.	*Residence.*	*Number of shares.*
H. P. Frost	New Haven, Conn	100
H. B. Lytle	Boston, Mass	100
H. D. Cooke	Washington, D. C	100
Morris F. Tyler	New Haven, Conn	100
A. G. Davis	Baltimore, Md	100

FIFTH. The period at which said association shall commence is the day when it becomes a body corporate under the aforesaid acts, and the period at which said association shall terminate is 90 years from that day.

IN WITNESS WHEREOF, we, the persons above named, have hereunto set our hands and seals this 30th day of June, in the

year of our Lord one thousand eight hundred and eighty-three.

H. P. FROST. [SEAL.]
H. B. LYTLE. [SEAL.]
MORRIS F. TYLER. [SEAL.]
H. D. COOKE. [SEAL.]
A. G. DAVIS. [SEAL.]

In presence of—
ROB'T F. TILNEY.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 30th day of June, one thousand eight hundred and eighty-three, before me personally came H. P. Frost, H. B. Lytle, H. D. Cooke, Morris F. Tyler, and A. G. Davis, all to me known and known to be the same persons described in and who executed the foregoing instrument, and they then severally acknowledged to me that they executed the same and they did severally sign and seal the same for the uses and purposes therein mentioned.

[SEAL.] ROBERT F. TILNEY,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 363.

Brf. of Griggs & Worthington &

Supreme Court of the United States.

Appl. on question by Court

OCTOBER TERM, 1901.

Filed April 3, 1902.

No. 363.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, APPELLANT,

vs.

J. FORREST MANNING AND HARRY E. RUPPRECHT, TRADING AS J. FORREST MANNING AND COMPANY, APPELLEES.

Brief on the Question Whether the Decree of the Court of Appeals of the District of Columbia is Final and Appealable.

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The decree of the Court of Appeals, after reversing the decree of the supreme court of the District of Columbia dismissing the bill, remands the case to the supreme court of the District "for the entry of a decree granting the injunction in conformity with the opinion of this court" (1182).

The prayer of the original bill in this case was that a preliminary injunction should be issued and made perpetual at the final hearing, enjoining the defendant and its officers and agents, upon the payment into court by the complainants of the statutory rate of compensation, from removing the telephone and appliances from the place of

business of the complainants and from neglecting or refusing to connect the same with other telephones in the city of Washington and elsewhere, and from neglecting or refusing to furnish telephone exchange service to the complainants in the same manner as they had theretofore furnished such service (5).

Three weeks after the bill was filed an injunction was granted *pendente lite*, in exact accordance with the prayer of the bill (15, 16).

In its opinion, the Court of Appeals after holding that the appellant was bound to render telephone service at the rates fixed by the act of 1898 or withdraw from the District, said:

"Persisting in its business, it [the appellant] must be regarded by the courts as accepting the condition and coming under obligation to perform its services at the statutory rate. So persisting and at the same time refusing obedience, it is within the judicial power to compel defendant to observe the rate fixed by Congress until such time in the future as it may voluntarily withdraw from business or Congress may relieve.

"According to this view of the defendant's rights and obligations, the preliminary injunction was properly granted, and should have been perpetuated on final hearing, with the limitation before suggested" (1176).

The limitation of the injunction here referred to is explained by a preceding sentence on the same page:

"Congress could not, and did not, undertake to compel the defendant to remain in the field of operations and carry on business at the imposed rate against its will."

The closing sentence of the opinion is:

"For the reasons given, the decree will be reversed with costs, and the cause remanded for the entry of a decree granting the injunction in conformity with this opinion."

The case was remanded, therefore, for the purpose of having the supreme court of the District of Columbia, sitting in equity, enter a decree enjoining the defendant from removing the telephone of the appellees and from refusing to render telephone-exchange service to the appellees so long as the company should continue doing business in the District. In other words, the Court of Appeals remanded the case for the purpose of having a specific decree entered in the court below, which disposed of all the merits of the case.

This court has frequently held that an order remanding a cause for further proceedings in the court below is not a final decree; but it has also repeatedly decided that when the purpose for which the cause is remanded is merely for the entry of a specific final decree or judgment the order remanding is itself final and therefore appealable.

Thus in Commissioners of Tippecanoe County *vs.* Lucas, 93 U. S., 108, it was held that an order which reversed a judgment below and remanded the cause with directions to dismiss the complaint was a final and appealable judgment.

In Mower *vs.* Fletcher, 114 U. S., 127, an order reversing the judgment below and remanding the cause "with directions to enter judgment upon the findings for the plaintiff, as prayed for in his complaint," was held to be final.

And in a number of cases this court has held that when a case has been remanded by it with directions to enter a specific judgment or decree, an appeal from a judgment or decree so entered will be dismissed *on the ground that a decree so entered is, in effect, a decree of this court* (Stewart *vs.* Salomon, 97 U. S., 361; Mackall *vs.* Richards, 116 U. S., 45).

If, therefore, this appellant had allowed the case to be remanded and a decree for a permanent injunction entered, the Court of Appeals would have rightfully dismissed such appeal, and the appellant would have lost altogether its right to bring the case to this court.

In Humphries *vs.* D. C., 174 U. S., 190, a writ of error was issued upon a judgment of the Court of Appeals of the

District of Columbia, which directed that the case be remanded to the supreme court of the District of Columbia, with directions to set aside a verdict and judgment for the plaintiff and award a new trial. The ground of the decision of the Court of Appeals was that the judgment was a nullity. The case was heard and determined here without any suggestion from counsel or from the court that there was any question as to jurisdiction.

In the following cases in the State courts a judgment of an intermediate court of appeal remanding a case for the entry of a specific judgment or decree in the court below has been held to be a final judgment and as such appealable, the State courts citing some of the foregoing cases in this court as authority for such conclusion (Bank *vs.* National Live Stock Bank, 155 Ill., 250; Young *vs.* Thrasher, 123 Mo., 312; Tourville *vs.* Wabash R. R. Co., 148 Mo., 623).

The case of Atlanta *vs.* First Methodist Church, 83 Ga., 449, is exactly like the case at bar. That was a case of an appeal from a decree reversing a decree in the court below and remanding the case with an opinion which left the court below no option but to issue a permanent injunction. It was held that the decree was final upon the authority in part of Commissioners of Tippecanoe County *vs.* Lucas, 93 U. S., 108.

Unless we have misapprehended the point which the court had in mind when it requested the filing of additional briefs in this case on the question of jurisdiction, it seems clear that the court has jurisdiction. If, however, the court is of opinion that the decree appealed from is not final because it remands the case to the supreme court of the District of Columbia for the entry of a permanent injunction and dismisses the appeal on that ground, we are authorized by counsel for the appellees to say that, with the permission of the court, the mandate of the Court of Appeals will be sent to the supreme court of the District; a permanent injunction entered in accordance with the mandate; an appeal

at once taken to the Court of Appeals, which court will, of course, affirm the decree entered in accordance with its mandate; and a second appeal to this court will be taken and perfected, and the case, by stipulation, submitted upon the record and briefs already here and the argument here tofore made.

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